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Supreme Court, U.S.
FILED
991386 JAN 27 2000
OFFICE OF THE CLERK

NO. 99-A457

In The
SUPREME COURT OF THE UNITED STATES
Winter Term, 2000

Glen Qualls, et al.
Petitioners,

v.

City of Detroit, et al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

I. When a municipality has an automatic license renewal scheme and decides not to renew a license, does a license holder have a due process right to notice of the decision not to renew prior to expiration of the license?

II. Are violations of civil rights committed in violation of valid and outstanding injunctive and protective court orders retroactively justified when the injunction is vacated after appeal ?

PARTIES

Pursuant to Rule 29.1 there is no parent or subsidiary company, save Ho-Lee Kow Fireworks Factory, Fireworks Unlimited, and Pyrotechniques Limited, listed in the plaintiff caption below. The individual defendants are agents of the City of Detroit.

Glenn Qualls, Leticia Qualls, and Elizabeth Qualls, Paul Smigelski and Diane Smigelski, individually and dba Ho-Lee Kow Fireworks Factory, and Fireworks Unlimited,Berta E. Perez, Paul A. Brussee, individually and dba Pyrotechniques, Ltd. dba Ho-Lee Kow Fireworks Factory and Fireworks Unlimited,
Petitioners,

v.

City of Detroit, and
Donald L. Robinson, Rayo Baker,Alberta Whitfield, Frank Jackson, Donald Pailen,Richard Lang,Greg Plummer, William Sneed, Robert P. Michalak, [FNU] Curly, David Vann and [FNU] Watson, William L. Hart, James Bannon, Esther Shapiro, Robert Michalik, Thomas Raymus, Marvin Monroe, Mujad Malik, Thomas Peterson, Joseph Zara, Bernhard Mueller, Fred Brandt, Robert E. Williams, Robert Butucel, Steven Hine, Thomas Bowser, Donald Smith, Richard Hathaway, Michael Habib, Michael McCartha, Tim Thomas, Robert Hanes, Steven Mason, Thomas McFarland, Roger Tomei, Paul Cox, Tom Delor, Shelley Tynan, Kenneth Tye, Daniel Kmiecik, Dennis Van Fleteren, Paul Kersanty, Thomas Koval, David Rees, Frederick Burkheiser, Godfrey Qualls, Gregory Hill,Cheslie Lockett, Richard P. Lang, Joseph Smith, Odell Parker, John Bozich, Philip Lipscomb, Amer A. Aazaad, Gregory J. Love, Danny Kemp, Charles Pritchett,

Raymond L. Kunik,Gerald White,William Dunn, Hilda Montleon, John Savinski, Peter Ringler, David Vann, Jack Generalovich, Ralph Daniels, Arnold Joseph, Dennis Holland, P.O. Upshaw, P.O. McKenon, P.O. Weir, R. Wilson, P.O. McCandan, Willie Sneed, Frank Ward, C. Whitfield, John Doe, and James Roe, Sandra Slayton, Donald Bloom, Seth Doyle, O. Wilson, William Martin, and Sergeant W. Stephenson, in their individual and official capacities,

Respondents.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court by seeking a Writ of Certiorari from the judgment of the Michigan Supreme Court, denying delayed Application for leave to appeal on August 31, 1999, declining to address state, federal and constitutional questions, when the opinion of the court on remand and the actions of the City of Detroit, its ordinance, licensing and enforcement activities, are repugnant to the United States Constitution. Jurisdiction is conferred upon the Court to review the judgment and orders in question by Writ of Certiorari pursuant to 28 U.S.C. § 1257 (a).

Constitutional Provisions Involved

United States Constitution, Amendments One, Four, Five and Fourteen, impacting due process and privileges and immunities applied to 42 U.S.C. § 1983 and Detroit Municipal Code § 19-3-70 reproduced at App. P.

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ARGUMENT

I. PETITIONER QUALLS HAD A VESTED SUBSTANTIVE RIGHT TO RENEW A LICENSE DURING LITIGATION WHICH INVALIDATED THE CITY'S ORDINANCE AND AS MINIMUM DUE PROCESS WAS ENTITLED TO TIMELY NOTICE OF THE CITY LICENSING AGENCY'S DECISION NOT TO RENEW IT.....1

II. A MUNICIPALITY'S PATTERN OF VIOLATING CIVIL RIGHTS INCLUDING FOURTH AMENDMENT RIGHTS, AS WELL AS INHERENT PRIVILEGES AND IMMUNITIES AND DUE PROCESS RIGHTS SECURED BY THE FOURTEENTH AMENDMENT, IS NOT VITIATED WHEN AN ORDINANCE DEEMED UNCONSTITUTIONAL IS SUBSEQUENTLY GIVEN A DIFFERENT APPELLATE READING AND THE TRIAL COURT'S RESTRAINING ORDER IS VACATED ON REMAND.....7

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STATEMENT OF THE CASE

A. ENFORCEMENT ACTIONS AND THE CHALLENGED ORDINANCE

There was a substantial amount of fireworks litigation in Michigan and elsewhere in the late 1970's. The Michigan statute (MCL 750.243a, et seq., MSA 28.440(1) et seq.) was effectively nullified by federal court rulings and thereafter amended in 1978 and again in 1980. In addition, the Detroit fireworks ordinance was amended in 1978 and substantially revised in 1979 under the guise of codification. It is against this backdrop that the present dispute between Petitioner Glen Qualls and the City of Detroit over the drafting, construction and validity of the Detroit Ordinance 314-H, as amended, Municipal Code § 19-3-70, et seq. and MCL 750.243a et. seq. arose.

Qualls is a fireworks expert who studied the local, state and federal regulations. He obtained a federal Class B manufacturing and storage license from the BATF for low explosives to put on public displays for various municipalities and civic organizations. He was a member of the Michigan State Police ("MSP") Fireworks Advisory Board while it was active in the early 1980's.[1] He joined the APA and the Michigan Pyrotechnic Association, serving as its president for a year. He has been accepted by the three circuit judges below in this case as an expert in the area of pyrotechnics and has been qualified as an expert in other fireworks litigation.

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[1] The MSP Fire Marshal Division estimated the sale of consumer fireworks in Michigan at $30-40 million annually in the early 1980's. According to the Summary of Trade and Tariff Information, U.S. International Trade Commission, TSUS Item 755.15, consumption doubled nationally in the 1980s and continues to rise.

When Petitioner Qualls started his business in 1978, no city license was required. He was the first licensee in 1979 and apparently remained the only licensee in Detroit until some time between 1987 and 1988. The City's records show that only one other individual managed to obtain a retail fireworks license from 1979 through 1992. Defendant Esther Shapiro, who has continuously been the Director of the Detroit Consumer Affairs Department ("CAD"), has always supported the total prohibition of fireworks and believes that consumer fireworks have no "socially redeeming value" (App. O) In her capacity in this position she is also responsible for supervising the application, grant and renewal of all business and ocupational license in the City of Detroit.

Petitioner's argument has always been that the ordinance, on its face and as applied, is in effect a total prohibition of the retail fireworks business in Detroit. Qualls ceased to be in business after the ordinance was enforced against him in 1993. On information and belief, there are no licensed retail fireworks dealers in Detroit today.

As set forth in the history of the litigation in *Detroit v. Qualls*, 434 Mich 340 (1990) (*Qualls I*), the City seized a mass of fireworks from Qualls when it arrested one of his employees in 1979. There was a further seizure in 1980. After Qualls sued for return of property in 1981, the City filed a complaint for forfeiture as an alternative to returning the fireworks, based on a claim of illegal storage (*Detroit v. Qualls*, WC No. 81-129784-CZ). In 1982, the Hon. John Hausner ruled that it was the City and not Qualls' employee who had violated the law. He approved Qualls' practice of selling restricted fireworks to persons indicating they were to be transported out of state. (App. L)[2]

Petitioner contended that Defendant City has deliberateiy

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[2] The City had stipulated at a 6/10/82 licensing hearing to be bound by Hausner's ruling, if Qualls prevailed and to issue his 1982 license. (App. M)

misled the courts and manipulated this issue as an ex post facto justification for its attacks on Plaintiff-Appellant in 1985-1986, in spite of having stipulated on 6/10/82 to be bound by Judge Hausner's 6/17/82 Order approving Plaintiff's sales practices.

In 1984, Qualls was issued a ticket claiming that he violated the Detroit 100 lb. gross weight storage limitation, *People v. Qualls*, 36th D.C. No. V87-516. That was the beginning of *Qualls I*. Qualls challenged the validity of this provision as applied to consumer fireworks. In this 1984 criminal prosecution, Qualls also claimed that, in the interim, the DOT and APA had conducted definitive testing in 1983, demonstrating the essential safety of common consumer Division 1.4 (old Class C) fireworks.

An evidentiary hearing was held in the 36th District Court on 12/4/84. Qualls produced Dr. John Conkling, a chemist and the Director of the APA. Widely regarded to be the foremost fireworks expert in the country, he testified about the characteristics of consumer fireworks and the results of the testing which had been done by the APA and DOT in 1983, specifically:

a. consumer fireworks suitable for use by the general public have strictly limited pyrotechnic and explosive content because of the federal regulations;

b. they are 75% packaging and cannot cause a mass explosion or deflagration;

c. they represent no greater danger to the public or to firefighters than an ordinary fire.

d. that there was no rational basis for the Detroit ordinance limiting a retailer to a 100 lbs. gross weight and that the ordinance's magazine requirement increased the danger because of confinement.

The 36th District Court, on December 4, 1984, held the storage provision unconstitutional and ruled that the searches of Plaintiff-Appellant's business after the initial inspection were unconstitutional inasmuch as they were warrantless, for the purpose of gathering evidence of crime and not under exigent circumstances; *Michigan v Tyler*, 399 Mich 364 (1977); 436 US

499 (1978).

After the District Court ruling, the City returned to Judge Hausner in the 1981 case on 12/12/94, and asked him to hold Qualls in contempt on the theory that Qualls had violated the 1982 orders by possessing more than a 100 lbs. On December 12, 1994, the Court told the City that it was an administrative matter. If the City believed that Qualls had violated the terms of the license issued pursuant to the 1982 order, then they should revoke the license.

Defendant Esther Shapiro, the CAD Director, put a "do not renew" order on Qualls' license on 12/16/84, did not send him his automatic renewal papers, refused to give him an application in person and then responded to a written request for the 1985 license with four reasons for its summary denial on 4/22/85 without a hearing or notice of right to appeal. Three of the reasons for the denial have been abandoned as false or irrelevant. The final reason, that Qualls had possessed more than the 100 pound limit in violation of his 1984 license is at the heart of *Qualls I*.

Shapiro claimed to be unaware that those charges had been dismissed, the ordinance struck down and contempt denied by Hausner when she wrote the 4/22/85 denial letter . (App O). She claimed that she would not have refused the license had she known. Petitioner argued below that the refusal to renew Qualls' license in 1984 was under taken in bad faith and was a part of the City's campaign to eliminate its only licensed fireworks retail dealer and rose to the level of a constitutional violation under 42. U.S.C. § 1983.

While the City was in the process of denying Qualls his 1985 license, it appealed the 36th District Court decision invalidating the storage provision, suppressing the evidence from the warrantless seizure and dismissing two "failure to allow inspection" tickets. The Recorder's Court, without considering the merits of the case, overruled the District Court on the theory that Judge's Hausner's 1982 injunctive rulings had been binding declaratory rulings and that collateral estoppel applied. However,

he upheld the District Court on the illegality of the warrantless searches and seizures.

Qualls appealed to the Michigan Court of Appeals, which initially upheld the Recorder's Court in *People v. Qualls*, 157 Mich App 552, 403 N.W.2nd 594 (1987) on the collateral estoppel issue. Qualls appealed to the Michigan Supreme Court, which reversed and remanded to the Court of Appeals in *People v. Qualls*, 428 Mich 318 (1987) for consideration of the factual record made in the 36th District Court and the proceedings in the instant case (*Qualls v. Detroit*, Wayne County No. 85-515546-CZ), which was the beginning of the case decided by the Court of Appeals in an unpublished decision on 3/6/91, *Qualls v Detroit*, C.A. Nos. 95518, 115434, 118836, 118837 and 118908 (*Qualls II*.) (App.K.).

To get his 1985 license, Qualls first attempted to go to federal court for injunctive relief, but the federal court abstained *sua sponte*. Qualls then attempted to reopen *Detroit v. Qualls*, Wayne County No. 81-129784-CZ in order to obtain injunctive relief from Judge Hausner on the refusal to issue the license. Hausner refused to reopen the case, but urged the City to process the application, to which counsel for the City agreed.

By now it was June 1985. Qualls filed this action below to compel the issuance of a license or, in the alternative, to allow him to operate without a permit as allowed by MCL 750.243a(3). The City refused to timely process Qualls' application for permit, even after promising that it would do so. On June 28, 1985, Qualls opened without a license, relying on the state statute. On June 3, 1985, Judge Hausner issued an injunction protecting him.

In a series of actions which have become the heart of the damage case below, the City authorities intentionally violated Judge Hausner's Order without attempting an interlocutory appeal. On July 3, 1985, Defendant Fire Marshal Robinson, Chief of Police Hart, City Law Department Chief Pailen, a representative of the Mayor's Office and officers from the DFD, DPD and CAD surrounded his business, detained his vehicles, falsely declared an immediate hazard to life, falsely obtained a search warrant,

wrongfully searched two delivery vehicles and two contiguous buildings, seized all of his fireworks and told him to shut down. They gave him a ticket for having in excess of the 400 lbs. gross weight that Judge Hausner had allowed in his July 3, 1985 injunction by counting the weightof fireworks on the delivery vehicles as being a part of the premises for "storage purposes." Qualls was ultimately exonerated on all these allegations.

On July 4, 1985, Qualls reopened for business under the injunction. The police and fire marshal personnel then undertook an embargo operation which lasted until July 8, 1985. The embargo consisted of maintaining a large contingent of uniformed officers, blocking parking access with marked cars, warning every customer of possible arrest before they entered the premises and stopping and searching every customer as they left the premises. By the afternoon of the 4th, there were huge lines of delayed customers. Fire marshal personnel had stationed themselves inside the building to personally observe every transaction. Qualls moved the sales to an enclosed room and began delivering the goods in sealed packages. This resulted in the officers confronting customers as they left, forcibly taking and opening their packages, issuing tickets and making arrests. By late afternoon, the commander of the police precinct, Defendant Peterson, in conjunction with the head of the City Law Department, Donald Pailen, ordered the business to be shut down again, this time as a public nuisance on the basis that the enforcement requirements at Plaintiff's business had drained all the resources from the precinct and that, therefore, Qualls could not remain in business.

Qualls went back to Court on July 5, 1985 and obtained a supplemental injunction from the Honorable Helene White in Judge Hausner's absence, which again ordered the City to cease its harassment of Qualls' business and ordered the preservation of police tapes and radio transmissions. This Order was also ignored by the City of Detroit Law Department and Fire Marshal Division. The Communications Department erased the tapes.

The remainder of the July 4, 1985 weekend was a stand-off in

which Qualls and his employees were under constant surveillance.

On 7/6/85, in a pre-arranged and photographed incident, a decoy carrying only specific fireworks unrestricted by MCL 750.243a(3) was stopped and searched by officers. By this time, the officers had removed their identification. Her closed packages were ripped open and a false ticket issued, of which she was acquitted (Plaintiff Berta Perez). There was a further incident in which a police sergeant, in an attempt to confiscate a camera with which one of Qualls' employees was recording evidence, chased her to a locked enclosure and then smashed the window of a locked vehicle in order to obtain the offending film and camera, arresting her. The City settled her independent claim (*Pacheco v Detroit*). Defendants also settled that claim (Defendant Mueller) in this case below. The City lost or destroyed the pictures and camera.

Cross motions for contempt were filed after the above events. Judge Hausner held 21 days of evidentiary hearings between October 11, 1985 and April 29, 1986. He ordered parties to produce every available expert from the City, the MSP, the APA, the DOT, etc., in order for him to make declaratory rulings on the issues related to the validity of the Ordinance and the construction of the state statute. Judge Hausner read a 110 page opinion into the record on June 23, 1986, finding the City in contempt, exonerating Qualls, narrowly construing the state statute and invalidating the City Ordinance as it related to the retail sale of fireworks, including the 100 pound gross weight storage provision. Hausner allowed Qualls 1,000 pounds gross weight (Order 6/24/86 - *Qualls v Detroit*, WC No. 85-515546, App.N), the same amount that the DOT allows to be transported without as much as a warning placard.

While Mr. Qualls was in court receiving this decision (June 23, 1986), officers from the DPD, claiming to be unaware of the injunctions which had been issued in 1985, executed search warrants obtained through the Wayne County Prosecutor, based on the false claim that Qualls was engaged in illegal practices. They again seized all of his stock. These charges were ultimately

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Immediately after the raid, Judge Hausner issued orders to show cause against Detroit and the Prosecutor, ordering the seized fireworks to be brought to Court. The Prosecutor and the City refused at first, taking an emergency interlocutory appeal. The Michigan Court of Appeals initially entered a stay, based on bad faith claims about the dangerousness of these consumer fireworks. Further, Defendants claimed that Qualls' eight year practice of selling fireworks for transportation out of state in accordance with the specific provisions of MCLA 750.243a(3)(g) was illegal, contrary to their 6/10/82 stipulation, Hausner's unappealed 6/17/82 order, and the testimony of state's highest fireworks enforcement official, Lt. Eugene Shmitt, the MSP fire marshal, that the practice was legal.

Qualls filed emergency papers demonstrating the safety of consumer fireworks and the bad faith of the City. The Court of Appeals dissolved its stay order on July 1, 1986, but not before the police, fire marshals and Prosecutor had executed two more raids on June 28, 1986, again confiscating Qualls' stock. Again, all these charges were dismissed and most of his property returned by court order, the remainder being unaccounted for.

After the 1986 fireworks season, further motions for contempt, damages and attorney fees were heard by Judge Hausner. On October 17, 1986, Plaintiff amended his Complaint to seek damages for violation of federal constitutional rights, as well as common law torts and state statutory and constitutional

rights.

Further evidentiary hearings and civil discovery were pursued 1987 and in 1988, resulting in Judge Hausner's comprehensive permanent injunction, declaratory relief and contempt damages order on December 16, 1988. (App. R) This Order awarded approximately $125,000.00 in attorney fees to Qualls for work required by the City's contemptuous actions and slightly over $170,000.00 in contempt damages suffered by Qualls in his business as a result of the Defendants' wrongful actions in 1985 and 1986.

The 12/16/86 order below further specifically contained the following important findings:

1. He ordered an end to mass seizures in which the City would confiscate all of Qualls' retail stock if they claimed that he had engaged in a single illegal sale, possessed a single illegal item or had any excess poundage. The police were required to limit their seizures to the items involved in the allegedly illegal transaction or to give Qualls an opportunity to remove the overage, if weight were involved.

2. He approved a special windowless, heatless, lightless storage facility at the back of Qualls' business, built in conformity with MCL 750.243(d), allowing an additional 1,600 lbs. of consumer fireworks as pure storage rather than shelf stock.

The City did not appeal any of these 1985-1988 rulings except: (1) contempt; (2) contempt damages; (3) the power to license fireworks; (4) the overall validity of the Ordinance as it related to retailers.

The trial on the underlying civil rights/damage claim began on January 30, 1989 and continued until March 8, 1989, when it was mistried by Judge Hausner, based on the misconduct of the City, its counsel and Defendant Fire Marshal Robinson. Judge Hausner ordered one of the City's attorneys removed from the case and that the retrial be held outside the City of Detroit, based on the

Court's belief that the City was trying to intimidate the Court and control the courtroom by determining what exhibits (fireworks) could be allowed in the proceedings. The City responded with a motion to disqualify Judge Hausner for bias.

Interlocutory appeals followed and the Court of Appeals upheld Judge Hausner in its unpublished Opinion of March 6, 1991 (*Qualls II*). (App. K.) On June 27, 1989, the Michigan Court of Appeals entered an interim Order vacating Judge Hausner's ruling on the out-of-state sales pursuant to MCL 750.243a(3)(g), holding that such shipments could only be made by "common carrier." The Supreme Court stayed that order for the 1989 Independence Day season.

B. THE MICHIGAN SUPREME COURT DECISION IN DETROIT v. QUALLS, 434 MICH 340 (1990) REGARDING THE VALIDITY OF THE DETROIT 100 LB. GROSS WEIGHT STORAGE LIMITATION (QUALLS

After the remand of the 1984 "excess storage" ticket from the Michigan Supreme Court in Qualls, *People v Qualls*, 428 Mich 918, 403 NW2d 594 (1987), the Michigan Court of Appeals found in *People v Qualls*, 166 Mich App 587, 421 NW2d 248 (1988), that the unrebutted expert testimony in the 36th District Court supported Plaintiff's claim of the irrationality of the 100 pound gross weight storage limitation. However, the Court of Appeals declined to consider the evidentiary record developed before Judge Hausner below in 1985 and 1986, which further established the safety of consumer fireworks and the irrationality of the City's 100 pound gross weight storage limitation. The Supreme Court granted leave again and on June 7, 1989, issued a very narrow ruling at

Qualls, id, p. 334, fn 4:

"We emphasize that this opinion addresses only whether any regulation by the City concerning the retail storage of fireworks, which are not regulated under state law, necessarily conflicts with the fireworks act and whether there is any rational relation between such a provision and public safety. In doing so, we express no opinion on the validity of Judge Hausner's ruling in 1986 that the ordinance was invalid in its entirety. . . " (emphasis added).

At the end of the majority opinion upholding the rational relationship between 100 pound gross weight storage limitation, the Supreme Court said:

"This legal tug of war has generated a decade of litigation between these parties. It may well be that the Court of Appeals will sustain the ruling of the able trial judge who has lived with this situation for years, but we do not yet know that that is so. To avoid the possibility of setting off another round of fireworks below, we stay the effect of judgment in this case, pending the resolution of the cases now pending in the Court of Appeals." *Qualls, Id*, at p. 369.

Instead, the Court of Appeals remanded the civil case to the trial court, where the Hon. Louis Simmons issued opinions contrary to the findings of Judge Hausner, specifically holding that an alleged violation of the 100-lb weight limit warranted denial of renewal of a license, that Mr. Qualls had no vested property right in renewal of his license, and having failed to renew it his claims against the City for constitutional violations must likewise fail.

Neither the court on remand nor the *Qualls I* majority ever addressed the fact that the 1980 amendment to the Michigan

fireworks statute (MCL 750.243d), conforming to the Opinion of the Attorney General No. 5536, pp. 335-337 [1979-1980], specifically exempted "a retailer who has goods on hand for sale to the public in a supervised display area" from the storage requirements of MCL 750.243d. The fact that retail stock should not be considered storage at all indicates that the City's interpretation of Ordinance 19-3-70 to include all retail stock as storage further demonstrates the irrational and prohibitive effect of the 100 pounds limitation. The *Qualls I* dissent pointed out that the City's interpretation of its ordinance placed the ordinance in conflict with MCL 750.243d regarding storage. Judge Hausner specifically addressed this issue in his December 16, 1988 Order.(App.R) However, the Michigan Courtof Appeals, in its unpublished opinion in *Qualls II*, merely relied on the *Qualls I* opinion upholding the validity of the 100 pound gross weight storage provision, rather than analyzing the 1985-1986 record below on this point.

Qualls I never addressed the fact that the Detroit ordinance requires that even the 100 pounds gross weight must be stored in a Type 2 (high explosive) magazine suitable for Class B and Class A high explosives, i.e.-TNT or dynamite (27 CFR 55.203 and 208). Plaintiff-Appellant Qualls asked the Court of Appeals to revisit these issues and correct the mistakes which have continued in the record regarding the storage question in both the civil and criminal proceedings. After the 1984 ordinance violation was remanded by the Michigan Supreme Court to the 36th District Court for trial in 1990, the City abandoned the prosecution, depriving Qualls of the opportunity to correct the record in the original proceeding.

C. THE MICHIGAN COURT OF APPEALS' UNPUBLISHED OPINION IN QUALLS, ET AL V. CITY OF DETROIT, ET AL AND WAYNE COUNTY PROSECUTOR, COURT OF APPEAL NOS. 93518, 94209, 115434, 118836, 118837 AND 118908 (MARCH 6, 1991). (QUALLS II, APP.K)

In addition to the proceedings in the 1984 ordinance violation case, the Michigan Court of Appeals received a number of emergency and interlocutory appeals from 1986 through 1989 involving the injunctive, contempt and declaratory rulings entered by Judge Hausner in the 1985 civil case, originally filed simply to obtain a license for that season. Six of them were consolidated for decision on March 6, 1991 (*Qualls II, App.K*). That unpublished opinion found that Judge Hausner had made insufficient factual findings to invalidate the entire retail portion of the ordinance and that the rest of Hausner's rulings that had been influenced by his finding of total invalidity. The Court therefore remanded the case for a consideration of a number of issues including:

Whether the City had adequate standards for issuing a fireworks license, suggesting that, if there were not adequate standards, the City must either abandon its licensing scheme or give a license to all applicants. On remand, the City abandoned the licensing scheme contained within the fireworks ordinance itself in favor of the City's overall licensing scheme as the basis for establishing the standards for the issuance of fireworks licensing.

Petitioner Qualls initially conceded that Detroit's general licensing scheme was facially valid and provided adequate standards. However, after the City claimed that the refusal to renew a license did not require the same notice and pre-deprivation right to a fair hearing as it required in the case of the revocation of an existing license, Qualls withdrew that stipulation and challenged the adequacy of the City's general licensing ordinance in that respect. Further, discovery revealed that the setting of licensing fees was based in part on the Consumer Affairs Division's subjective analysis of the "social necessity" of the business. Thus, the "standards" issue and the validity of the licensing regimen are preserved for appeal to The United States Supreme Court, including whether record-keeping requirements of the ordinance

were unduly burdensome or prohibitory,
or even if the individual sections of the Detroit ordinance were valid, the overall effect of the ordinance was prohibitive and unconstitutionally enforced, based on the announced hostility of the Detroit authorities to the sale or use of consumer fireworks.

In *Qualls II*, (App. K) the Court directed the lower court to reconsider the amount of contempt damages on remand by reducing for costs of goods sold, re-examining the 25% per year growth rate and excluding profits from illegal sales. Because the Court on remand decided that Qualls was properly denied his license in 1985, the Court ruled that he suffered no damages for the admittedly contemptuous acts of Defendants in 1985 and 1986 because he was not legally in business, which finding Petitioner argued is clearly erroneous.

At *Qualls II* at p. 12-13, the Michigan Court of Appeals invited the parties to review the matter of summary judgment as to the individual defendants after discovery. The Court on remand ruled that the contemptuous violation of court orders, even resulting in criminal prosecution and confiscation of property, did not rise to the level of a constitutional tort.

Thus, almost all of the individual defendants were dismissed on summary judgment on remand, even though Qualls, his business, employees and customers had been harassed and prosecuted for more than a decade in violation of outstanding court orders and had never been found guilty of any violation. The court on remand also determined that the fact that Qualls' entire retail stock had been seized on at least five occasions, both without warrant and with falsely sworn warrants, was not a civil rights violation . (App. G)

Finally, the Court on remand even held that the illegal seizure accompanying the 1984 tickets (specifically suppressed by the 36th District Court, upheld by Recorder's Court and not appealed) and the dismissal of the two tickets for failure to allow inspection pursuant to People v Tyler, supra, did not make out a

constitutional claim. These rulings, as well as the dismissal of the municipal liability claim, are arguably issues of mixed fact and law unsuited to summary disposition preserved for review.

D. PROCEEDINGS ON REMAND AFTER THIS COURT'S DECISION OF 3/6/91 (QUALLS II).

The procedural oddities on remand began when the "able trial judge [Hon. John H. Hausner] who has lived with this situation for years" (*Qualls I*, p. 369), disqualified himself sua sponte and without prior notice on 3/18/92. At that time, all of the substantive decisions to be made on remand were either still pending or on reconsideration. The case was reassigned to the Honorable Louis F. Simmons.

Judge Simmons made it known that he was displeased to have such a massive, complex and aged case thrust upon him. Petitioner contended that Judge Simmons either would not or did not adequately review and grasp the voluminous prior proceedings. The court on remand adopted the course of least resistance, reversing Judge Hausner's prior rulings and eliminating the heart of Plaintiff's declaratory relief and damage case.

Judge Simmons presided over the case from March 18, 1992 until February 11, 1994. He held a bench trial in July and August, 1992, on the declaratory issues regarding the validity of the ordinance, the construction of MCL 750.243a, the conflict between the ordinance and the statute, and the pre-emption of the ordinance and the statute by the federal regulations. He entered an opinion on April 28, 1993, almost completely reversing Judge Hausner and exonerating the City. (App. E)

Judge Simmons then entered a second opinion on September 28, 1993, essentially gutting Plaintiff's damage claims, granting summary judgment to most of the individual defendants and adopting the City's arguments almost verbatim. (App.G)

Thereafter, on January 28, 1994, Judge Simmons

disqualified himself sua sponte without reason, except to state that he was biased and under severe personal stress. He suggested that the stress was related to disciplinary proceedings in which the Judicial Tenure Commission had requested public censure in another case involving the City of Detroit, then pending review in the Michigan Supreme Court. Cf., *In Re Simmons*, 444 Mich 781 (1994).

The case was then assigned to the Honorable Michael Stacey on 2/11/94, who announced his intention to dispose of it before he retired at the end of 1994. Judge Stacey was requested to vacate Judge Simmons' rulings based on Simmons' admitted, but unexplained, bias. Judge Stacey refused. He issued an opinion in the instant case June 30, 1994, denying reconsideration of any of the prior rulings and effectively ending the case. (App.I)

E. PROCEEDINGS IN QUALLS, ET AL V DETROIT, NO 92-206766 (CONSOLIDATED ON APPEAL).

After remand from *Qualls II*, Plaintiff Qualls moved to amend his complaint to add a First Amendment retaliation claim, based on the City's response to Appellant's successful actions in the state and criminal courts challenging the ordinance. Qualls further sought to amend the 1985 Complaint below to add the wrongful actions undertaken against him since the filing of the First Amended Complaint on October 17, 1986.

On December 20, 1991, Judge Hausner denied Plaintiffs' motion to amend the 1985 case. On March 6, 1992, Plaintiff filed *Qualls v Detroit*, WC No. 92-206766 to include the materials sought to be added by the amended complaint. The case was ultimately assigned to Judge Simmons because he had been assigned the 1985 case. In his sua sponte disqualification announcement of January 28, 1994, Judge Simmons specifically said that he knew that he was biased on the 1992 case, but declined

to elaborate. Regardless, Judge Stacey in essence adopted the Simmons rulings in the 1992 case in his bench opinion of June 30, 1994, on the 1992 case, exonerating the City for their wrongful acts in the 1989 civil rights mistrial and for their continued harassment of Qualls in violation of outstanding court orders through 1991, including multiple unsuccessful prosecutions.

As with the 1985 case, Petitioner Qualls settled the few remaining counts in the 1992 case and preserved his right of appeal on the underlying declaratory, summary judgment and damage issues. Thus, these cases are reasonably and properly consolidated on appeal.

It is impossible to receive shipments of consumer fireworks under the Detroit 100 pound limitation because, pursuant to 49 CFR 173.108, 109 and 111(11), USDOT Class C fireworks are shipped in wooden boxes of up to 150 pounds and cardboard boxes of not less than 40 pounds. Because most consumer fireworks are manufactured in Asia, they are boxed and shipped from there through importers and distributors (like Red Devil). The retailer has no control over the size. Under the Detroit storage ordinance, he cannot even receive a shipment containing one case of each of the different categories of consumer fireworks, much less different brands or sizes. It is impossible to do business.

Section, 19-3-6. License Fee

The evidence indicated that the fee for a retail fireworks license was $50 when the ordinance was first enacted in 1979, raised to $250 in 1982, raised to a non-refundable $1,000 in 1987 and was raised again an automatic 15% in 1992 to $1,150.

Dr. John Conkling testified that the Detroit annual license of $1,000 for a seasonal business was quite high. $100 was the typical fee nationwide. The highest fee of which he was aware were those on the year-round interstate highway operations in Tennessee ($750), while seasonal retailers were only charged $25 per year.

David Opperman, the City's expert witness admitted that he

knew of no other fees in Michigan as high as Detroit's and that the Michigan retail fireworks business is seasonal only, not year-round.

Esther Shapiro, is Director of the Detroit Consumer Affairs Division. (App. O)

(a) She admitted that Plaintiff Qualls was the first applicant for a license after the ordinance was passed in 1979. Thereafter, the City went to a cost-based licensing fee schedule in 1982 and that the fireworks fee was raised to $250. The increase in fees was based on the estimated cost of application processing, renewal and enforcement..

(b) She admitted that there was a chart which showed the 1982 cost base calculations, that she was the only remaining City employee who could testify as to the process and that the 1982 increase to $250 involved only data related to Plaintiff Qualls, who was the only license holder from 1979 to 1982.. Consequently, on its face, it appears that the unsuccessful 1979-1981 prosecutions, seizures and forfeiture actions undertaken against Qualls by the City were the sole basis for the increase of his fees from $50 to $250 in 1982.

(c) Shapiro said that the fee schedule was reviewed again in 1987 and increased, based on the cost of enforcement activity to the City since 1982. She denied without documentation that the cost of the appeal in *Qualls I* and the cost of the contemptuous enforcement actions undertaken in 1985 and 1986 were used in the analysis of the 1987 fee increase.

(d) However, she could not say whether or not anyone else had obtained a license by 1987, but that only Qualls had been licensed between 1982 and 1984 and that Qualls might have been the only licensee between 1982 and 1987, when the fee was raised to $1,000.

(e) She admitted that she consulted with co-defendants Fire Marshal Robinson and Inspector White in determining the 1987 fee increase, but denied that any part of the cost was based on

the enforcement actions taken against Qualls. But she then admitted that part of the increase might have been based on those costs because they came undifferentiated from the fire, police and building departments.

(f) She further admitted that the increased cost of the fireworks licensing fee was in part based on enforcement activities taken against unlicensed establishments.

(g) She admitted that she could not rebut the claim that in 1987 $1,000 was the highest retail fireworks license fee in the country or that it was based on the illegal (contemptuous) enforcement actions against Qualls.

(h) She admitted that the $1,000 fee was the highest licensing fee for any licensed activity in the City. The licensing fee for Tiger Stadium was only $656 and for the Renaissance Center Westin (more than 500 room hotel), was only $690.

(i) She admitted that the 1982 fireworks retailers fee was the only fee in the City which was quadrupled in 1987.

(j) After the above information was elicited on cross-examination by Plaintiff, defense counsel attempted to rehabilitate Shapiro by showing that the 1987 licensing fees for "taxi-dancing halls" was as high as that for fireworks .

(k) On re-cross-examination, she admitted reducing fees in relation to costs for what she considered to be socially necessary businesses.

(l) She admitted that she had testified at deposition that consumer fireworks have no socially redeeming value.

(m) She further testified that since the 1987 fee increase on taxi-dancing halls, there were none left in the City.

(n) Finally, there was back and forth discussion throughout Shapiro's testimony about one other establishment that had held a retail fireworks license some time between 1987 and 1992, but that she could not determine when or how long that license was held.

The parties agree that when Qualls abandoned his attempt

to remain in business after 1992, there were no licensed fireworks retailers in Detroit. On information and belief, there are still none.

§19-3-69 of the challenged ordinance deals with transportation in the City. It is completely invalid and preempted for a number of reasons. Subsection (a) provides that it shall be unlawful to transport "fireworks, firecrackers, sparklers or other pyrotechnics of like character" without obtaining a permit from the fire marshal. On its face, it would apply to a retail customer.

The DOT allows the transportation of 1,000 pounds of consumer fireworks [49 CFR 172.504(c)(1)] for commercial purposes, without the need for a permit or a placard. Subsection (c) of the Ordinance adopts the NFPA standard for interstate commerce, rather than the DOT regulations, making it conflict with state law. Further, MCL 750.243c has specifically adopted the DOT regulations for intrastate transport, as has the Michigan Hazardous Materials Act (MCL 480 et. seq). Next, the Detroit Ordinance 19-3-69 makes no differentiation as to class and could therefore, be read to apply the same requirements to the transportation of consumer fireworks that apply to Class B, Div. 1.3 explosives, contrary to DOT regulations.

Thus, Judge Hausner was correct in his 1986 ruling that the Ordinance was invalid and in conflict with the state and federal law in all of its essential aspects (storage, insurance, license, renewal, transportation, record keeping, classification, location, zoning, use, etc.). Judge Simmons ignored the record made from 1984-1992 to uphold the validity of most of the Ordinance.

In his orders from June 3, 1981 through June 24, 1986, Judge Hausner specifically allowed Plaintiff Qualls to possess all DOT Class C consumer fireworks for sale to the public, whether or not they were restricted for use in Michigan.
(App. L,M,N,R) His 12/16/88 Order was never appealed on an interlocutory basis and was not addressed in the Michigan Court of Appeals unpublished decision of 3/6/91.(App.K.)

PROCEDURAL HISTORY BELOW

In an unpublished opinion on May 26, 1998 the Michigan Court of Appeals affirmed the rulings of the Court on remand. (App. D) On September 4, 1998 the same Court denied rehearing. (App. C.) On August 31, 1999, the Michigan Supreme Court declined to review the questions presented on delayed application for leave to appeal the May 26, 1998 Order of the Michigan Court of Appeals, because it was not persuaded that the questions presented should be reviewed. (App. B.) On December 1, 1999 Justice John Paul Stevens granted Petitioner's Motion to extend time to file Petition for Certiorari. This petition is filed in conformance with that order. (App. A)

Additional published earlier history of the case may be found at *Detroit v. Qualls*, 434 Mich. 340 (1990), *People v. Qualls*, 166 Mich. App. 552, 421 NW2d 248 (1988), and *People v. Qualls*, 428 Mich. 318 (1987.)

I. PETITIONER QUALLS HAD A VESTED SUBSTANTIVE RIGHT TO RENEW A LICENSE DURING LITIGATION WHICH INVALIDATED THE CITY'S ORDINANCE AND AS MINIMUM DUE PROCESS WAS ENTITLED TO TIMELY NOTICE OF THE CITY LICENSING AGENCY'S DECISION NOT TO RENEW IT.

Enforcement of licensing legislation whether aimed at regulation or revenue must satisfy applicable due process requirements and not abridge privileges and immunities protected by the Fourteenth Amendment. *Gray v. Connecticut*, 159 U.S. 74, 40 L.Ed. 80, 15 S. Ct. 985 (1895.) 51 Am Jur 2d §70; *Saenz v. Roe*, 526 U.S.--, 119 S. Ct. 1518 , 143 L.Ed2d 689 (1999). A person's failure to renew a license will not preclude him from maintaining an action in tort for damage related to that activity. Id. §69, *Huffmire v. Brooklyn*, 48 N.Y.S. 132, 57 N.E. 176 (1897.) There is a split in authority as to whether delay attributable to licensing officials will relieve an individual from penalty for carrying on an unlicensed activity. Likewise, wrongful refusal of a licensing officer may or may not permit an individual who has otherwise complied with applicable regulations to engage in any lawful activity. Id. § 71, *Diapulsa Mfg. Co. v Birtcher Corp.* 221 F. Supp. 139 (1965.)

A wrongdoer may not rely on an irrelevant unrelated violation on Plaintiff's part, a distinction between ex contractu and ex delicto actions supported by Restatement of the Law of Torts § 889, 13 ALR 2d § 157. The burden of proving an alleged violation of licensing laws rests on the licensing authority, with the degree of proof governed by the civil or criminal character of the enforcement proceedings. The burden of challenging a licensing scheme to establish invalidity of the underlying ordinance or reasonableness of the fee is on the person who makes the assertion and equitable remedies are available to him including mandamus and injunction. 51 Am. Jur 2d § 70,79, 80. Petitioner Qualls had

prevailed on all charges at all levels until apellate remand. (App.L,M,N,R)

In *People v. Rawley* 231 Mich. 374, 204 NW 137 (1925) and *Vernor v. Secretary of State* 179 Mich. 157, 146 NW 338 (1914), the Michigan Supreme Court established a rule that if a licensing regimen is so clearly excessive that it amounts to a prohibition the act must fall. Historically, such analysis turns on whether the licensing regime is in fact a disguised tax, beyond the reach of a municipality's police power. *Op. Justices*, 112 NH 166, 290 A 2d 869, 872 (April 28, 1972.) Licensing fees may not charge for general regulation of an industry and are generally limited to the sum which will compensate for registration, issuance, recording and inspection. *Nitkin v. Admin. of Health Services*, 91 Misc. 2d 478, 399 NYS2d 162 (1975.)

In *Nitkin* the court examined a licensing regimen which charged radiologists for the enforcement costs of a city's entire radiation control program. Petitioner Qualls was likewise subjected to fee increases based on the costs of all the city's fireworks enforcement activities, including unlicensed sales and fire calls. During the period comprising this litigation the licensing fee charged to Petitioner Qualls, (in fact the only person ever to complete the licensing process and sell fireworks in the City of Detroit, all other attempts failing to comply with the licensing regime without effectively transacting any business,) went from $50 in 1979 when the ordinance was enacted to a non-refundable $1000 in 1987, and is now $1150, a sum charged for only one other activity, which the city Consumer Affairs Division also wished eliminated as without redeeming social value, taxi dance halls.

For comparison Tennessee charges the highest fee for retail fireworks in the country, $750 for an annual license, $25 for a two week seasonal license. The City of Detroit charged Tiger Stadium $656 per year for its annual license, a 500-room hotel $690, and testified that its expert had determined that the

application,registration, clerical and renewal costs of a fireworks license were $238.04. (TR- Esther Shapiro, App O) Not only did the licensing fee scheme operate as a prohibition of a permitted activity under the guise of regulation, but fundamental rights inherent in a licensing regimen were violated by retaliatory enforcement actions of those charged with its operation once petitioner successfully challenged the constitutionality of the City of Detroit's ordinance.

California Courts have employed the following analysis to determine whether licensing impacts a vested fundamental right, thereby triggering a higher level of scrutiny upon review of an administrative termination of the license. *Berlinghieri v. Director of Motor Vehicles*, 33 Cal. 3d 392, 657 P.2d 383,385 (1983.)

"When an administrative decision affects a right which has been legally acquired or is otherwise vested,... and that right is of a fundamental nature from the standpoint of its economic aspect or its effect in human terms... and the importance to the individual in the life situation, then a full and independent judicial review of that decision is indicated because the abrogation of the right is too important to relegate it to exclusive administrative extinction."

Petitioner Qualls has devoted his life to the joyous expression of fireworks and the study of its science and is no longer able to engage in this enterprise. He is now destitute, despondent and disillusioned as a result of this deprivation. Mr. Qualls right to renew his license was extinguished by an arbitrary administrative decision of Consumer Affairs director, Esther Shapiro. By placing the note "Do Not Renew" in his license file and taking it out of the automatic renewal track until it expired, she accomplished by indirection that which she was not permitted to do directly.

Without so much as the customary notice of expiration and renewal, this violation of a vested fundamental interest was thereby

accomplished in the absence of any meaningful due process. Moreover it was accomplished in this manner with full knowledge that a formal revocation would have triggered a review hearing in which the City would undoubtedly have failed to prevail. The City's agents withheld the renewal application to create and exploit a change in status once it expired, creating an opportunity for arbitrary denial of a new license once the vested license expired.

On remand the court upheld this result grounded in a portion of the ordinance which had been invalidated at the time Ms. Shapiro made her decision regarding the alleged violation of the weight provision for stored fireworks, the very charge which had been dismissed as meritless in an earlier criminal action. Over ten years later the court on remand revived this groundless charge as a valid administrative basis for refusing to renew Mr. Quall's license.

Additionally, the court on remand found that Mr. Qualls had failed to make timely application to renew his license during the three months following the licensing division's administrative subterfuge, despite a record that Mr. Quall's was refused an application upon oral request and subsequent written request to the Consumer Affairs Division, and declined injunctive relief in the court with ongoing enforcement jurisdiction because the trial judge felt that he lacked authority to provide such relief, (as did the Federal District Court.) The trial court found it had already afforded Mr. Qualls a remedy in a protective order permitting him to operate his business without a license. (Judge Hausner Order, App. L,M,N,R)(Opinion on remand, Hon. Louis Simmons 9/28/93, App. G)

The Michigan Supreme Court compounded this error when they refused to revisit this issue, after remand. The Michigan Court of Appeals had earlier identified this conduct as a valid claim under 42 U.S.C. 1983. (App.K) On remand, the court specifically held that precedent identifying a valid property right in renewal of an existing license subject to periodic renewal as Petitioner Qualls'

license, need not be subjected to tolling analysis or any of the other mitigating factors presented to the court in *Detroit v. Mashlakjian*, 15 Mich. App. 236, 239-41, 166 NW2d 493 (1968).

Mashlakjian describes a license, whether called a renewal or new application, as a fundamental and vested property right, requiring due process protection, specifically notice and an opportunity to be heard. Accord *Bankers Life and Casualty Co. v. Cravey*, 208 Georgia 682, 69 S.E. 2d 87 (1982) and *Bundo v. City of Walled Lake*, 395 Mich. 679, 238 NW2d 154 (1976), a case squarely on point and contrary to the holding of the Michigan Courts, where even in the face of an admitted violation of a licensing ordinance, notice of intent not to renew communicated by city authorities to the licensing agency was found to impact an existing property right in the renewal, requiring notice to the license holder and an opportunity to be heard, and findings sufficient to withstand an arbitrary and capricious standard of review.

The court on remand reasoned ex post facto that denial was justifiable and that Qualls' application was distinguishable as untimely. Such analysis begs the triggering question for a Section 1983 due process claim: why was no application provided or available to file prior to the expiration of his existing license?

The answer is starkly evident. Unlike any of the other 4,000 licensees in the City of Detroit Mr. Qualls received no written or oral notice that his license would not be renewed, and was deprived of any meaningful opportunity to have his objection heard, precisely because the administrative authority knew of his defense- that any denial to license was baselessly grounded in a statute that had already been deemed invalid under an existing court order in his favor.

Other courts have reasoned more soundly, recognizing that even an explicit statutory provision prohibitting a court from enjoining suspension or revocation of a license must fall as unconstitutional, both to protect the rights and subject matter of the

litigation, and as a matter of preserving the inherent authority of the court and the public trust in the integrity of the judicial process.To find otherwise would nullify the appellate process such that neither party could rely on protective orders of the court. *Smothers v. Lewis*, 672 SW2d 62 (Ky.1984.) The Court on remand is clearly in legal error under this analysis and the Michigan Supreme Court has failed to recognize this error as a violation of fundamental due process rights afforded under the Fifth and Fourteenth Amendments requiring clarification and remedy by the United States Supreme Court.

II. A MUNICIPALITY'S PATTERN OF VIOLATING CIVIL RIGHTS, INCLUDING FOURTH AMENDMENT RIGHTS, AS WELL AS INHERENT PRIVILEGES AND IMMUNITIES AND DUE PROCESS RIGHTS SECURED BY THE FOURTEENTH AMENDMENT, IS NOT VITIATED WHEN AN ORDINANCE DEEMED UNCONSTITUTIONAL IS SUBSEQUENTLY GIVEN A DIFFERENT APPELLATE READING AND THE TRIAL COURT'S RESTRAINING ORDER IS VACATED ON REMAND.

The Michigan Supreme Court affirmed without comment the legal reasoning of the court on remand in setting aside Petitioner Qualls claims for violations of civil rights under 42 U.S.C. § 1983 in Qualls II, a civil suit brought against the city for its actions after its ordinance was invalidated, subsequently consolidated with the ordinance violation on appeal. (Op. Hon. Louis Simmons, Sept. 28, 1993 at App. G) Relying on the qualified immunity reasoning expressed in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 1717, 73 L.Ed. 2d 393 (1982) and *Anderson v. Creighton*, 483 U.S. 635, 639-41, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987), the court on remand deemed most of the city's agents engaged in discretionary functions as outside Section 1983 liability as a matter of law and subjected Petitioner Qualls civil rights claims to summary disposition.

Asserting that a claim of systematic harrassment and malicious prosecution was dependent on a violation of a specific identifiable constitutional right, the court on remand cited 16 A CJS Constitutional Law § 27A, p.115 for the proposition that Mr. Qualls had no vested property right in the trial court's order while it was subject to appeal and control of the court, and therefore dismissed complaints that fire and police officials swore out warrants in the face of a protective restraining order permitting Mr. Qualls to conduct business without a city permit, simply because the court could later rule he had no right to be in business as a

result of a subsequent appellate reading which later revived a portion of the constitutionally invalidated ordinance.

Unfortunately, the cited authority is merely half of the loaf. The CJS section was concerned with subsequent legislative impairment of judgments, immediately distinguishable from a judicial action. Moreover, the same section at p.117 distinguishes public rights from private rights, and in stark contrast upholds the authority of the trial court's orders as determinative of rights immediately adjudicated before it. The language cited by the trial court is only applicable as incidentally conferring no vested right on third parties indirectly affected by the trial court's order. By implication, in contrast to the holding of the Michigan Courts, Petitioner Qualls, had a private and present right to conduct business at the time of the alleged civil rights violations secured by court injunction as well as an inherent " vested " right to rely on that privilege he obtained by lawful process, which vested at that time and continued until a contrary order issued from the new fact finder on remand. In addition, Petitioner Qualls secured immunity from further undue process by the City of Detroit granted specifically to him by the trial court and secured by the Fourteenth Amendment.

These private rights, whether First Amendment, commerce, or property rights would be properly distinguishable from an assertion by a fireworks seller elsewhere making the same claim, because the third person would not be a party to the suit. The trial court simply conferred no public rights by its orders and misapplied this principle to the conduct of the parties' in the suit which explicitly conferred protected personal, commercial, liberty and property interests on Mr. Qualls.

Such a reading is consistent with the Michigan Court rule under which the protective injunction issued:

" An Order granting an injunction or restraining order: (4) is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in

active concert or participation with them who receive actual notice of the order by personal service or otherwise. " MCR. 3.310.

It is precisely by virtue of this active concert and participation, that Petitioner Qualls earlier prevailed on findings of contempt against the same city and its agents for the same acts, raising evident questions of fact and law under the very authority cited by the remand judge whether " a reasonable official would understand that their actions violated a clearly established right." *Guider v.Smith*, 431 Mich. 559, 565, 568 (1988, citing, Harlow, supra. in App. G)

By imperfectly finding as a matter of law in summary disposition that Mr. Qualls had no rights to be violated, the jury questions regarding the additional elements of a section 1983 claim including proximate cause, willfull misconduct, and actions under color of law, custom or usage were obviated in contravention of the Michigan Court rule relied on to grant summary disposition.

MCR 2.116 (C)(10) expressly provides: "(10) Except as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The court on remand raised a mixed question of fact and law regarding section 1983 liability when it expressly found that the license renewal division had a " mere ...custom " of forwarding renewal applications, which was not done in the instant case, and that a city agent, Esther Shapiro, with an expressed animus to Mr. Qualls and his trade, had thwarted this process, which petitioner maintains is the proximate cause of any failure to renew of his license.

To restate this tautology, when wrongful government actions cause a party's right to expire, there is no remedy under the statute providing for redress of government violation of civil rights because the right has expired.

Rights protected under the § 1983 are also protected against impairment by policy or custom under color of state law and may proceed under a theory of respondeat superior. Some jurists view the question as turning on who in fact is the policy maker; others ground relief in the remedies of the earlier variants of the statute. *Jett v. Dallas Independent Public School Dist.* 491 U.S. 701, 109 S. Ct. 2702, 2724; 105 L.Ed. 2d 598 (1989 conc. Scalia,J., diss. Brennan, Marshall,Blackmun, Stevens, JJ.); Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983, Ch.6 (4th Ed., 1998, citing inter alia, Amend. § 101 Civil Rights Act of 1991, Pub. L. No. 102-166, for the proposition that Congress intended that all benefits, privileges, terms and conditions of contractual relationships are protected against impairment or discrimination by local government under a joint reading with § 1981.) Such unbridled official discretion as evidenced here might well lead to a state of affairs in which citizens were left without any enforceable rights. *Suter v. Artist M.* 503 U.S. 347, 112 S. Ct. 1360, 118 L.Ed.2d 1 (1992, diss. Blackmun, Stevens, JJ.)

The court on remand erroneously relied on *United States v. United Mine Worker's*, 330 U.S. 252,295, 67 S. Ct. 677, 91 L.Ed. 884 (1947) and falls short of its intended mark in holding that Petitioner Qualls right to relief for a constutional tort for violation of an injunction failed when the injunction was subsequently vacated by the Michigan Supreme Court after appeal.(Simmons Op. App.G)

In *United Mine Workers* , even though the court lacked explicit statutory authority to issue the injunction, it was later upheld by a reading of legislative intent which was controversial at the time, and contrary to modern judicial construction. In marked contrast, the injunction at the heart of Qualls cases was a valid order, and the actions of the City of Detroit and its agents in the face of that order are properly evaluated at the time they occurred. The determination whether the city officials actions engaged in a pattern of harassment or malicious prosecution designed to impair

Mr. Qualls right to rely on substantive and procedural due process as fundamental to the integrity of the judicial system itself as the authority of the court's own orders, raises a jury question on its own merits, additional to any individual rights issues preserved for Section 1983 analysis.

The *United Mine Workers* opinion is moreover, instructive in distinguishing the public and private interests to be protected. Where the contempt proceeding is remedial only and relates to a private interest only, a remedy sounds in civil contempt, in contrast to those circumstances where the authority of the court and the public welfare require protection, requiring additional relief for criminal contempt.(Op. Judge Hausner at App. L, M, N,R)

United Mine Workers was decided in 1947, prior to any significant development of § 1983 liability analysis. The case turns on application of the War Powers doctrine to congressional legislation protecting union strikers from "government by injunction ," under circumstances where the United States government had become the employer, nationalizing the mines and regulating wages under an emergency act during World War II. Id. at 895.

The Federal court lacked authority to issue a 10-day temporary restraining order in the face of a miner's strike, because the statute granting such relief did not contemplate the United States as an employer. When the injunction expired due to its time limit and the Union went on strike, the United States Supreme Court held that the union officials were still liable for the criminal contempt fines, fees and costs for violating the terms of the order even though it was void ab initio.

The single sentence cited in the remand opinion as an impediment to Petitioner's recovery reads:

" The right to remedial relief falls with an injunction which events prove was erroneously issued. "

In the context of the cited opinion it becomes clear that further inquiry is necessary.

" An order issued by a court with jurisdiction over the subject matter must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional... violations are punishable as criminal contempt even though later set aside on appeal ... " as in excess of jurisdiction or that the basic action is moot.
Id., at 91 L.Ed 893.

In dissent, Justice Rutledge, envisioned the dangers of a later court employing this reasoning to breach the hull of the Shipp Doctrine, melding judicial discretion with criminal contempt and dissolving constitutional protection. United States v. Shipp, 203 U.S. 563, 27 S. Ct. 165, 51 L.Ed 319 (1906.) A subsequent finding of lack of jurisdiction does not enable disregard of a stay order.

" Some future government could easily utilize seizure as a subterfuge... whenever ... finding that the public interest was in peril... In other cases involving doubt, where statutory or other rights are asserted or the benefit of asserting them would vanish for any practical purpose with obedience to the order. " *United Mine Workers*, at 936, 943, (Rutledge, J. diss.)

In precisely this fashion the court on remand recognized the 4th Amendment implications and still upheld the seizure in 1985-86 of all of Petitioner Quall's stock to ascertain whether it exceeded the ordinance weight limit because now, in 1998 that portion of the statute which was deemed invalid at the time had been upheld on appeal. As described above in issue I, this suspect violation which was dismissed at the trial level was employed to justify non-renewal of Mr. Qualls' business license and years later justify dismissal of those portions of his civil rights claims.

The court on remand gave no weight to the commerce rights of customers or to congregate without search of their purchases, deeming them devoid of standing, dismissing any commerce rights Petitioner had to associate with his customers, and likewise deeming the right of named Plaintiff Berta Perez to be free of seizure and restraint of her person without a warrant as falling with the injunctive relief, and subsumed in the newly discovered constitutional validity of the ordinance after remand in 1998, to find probable cause that she possessed illegal fireworks in 1985, despite a contrary court order at the time of the violation, and an admission that there was no showing that she possessed, or that Mr. Qualls sold her illegal fireworks under any extant variant of law. (Remand Opinion 9/28/93, App G)

A litany of smashed windows, seizure of cameras and destruction of police radio transcripts ordered preserved by the trial court, damage to Mr. Qualls premises and seized stock, not to mention loss of business opportunity during the short fireworks season, is transmuted into lawful conduct by holding that since the earlier court's order was subsequently found to be partly in error, or vacated in part years later, the City's misconduct then is now deemed justifiable by misapplication of injunctive analysis in the *United Mine Workers* case to preclude any recovery for constitutional torts. In June of 1994 and May of 1996 other judges compounded this error on remand by likewise granting summary disposition under similar analysis as to any remaining claims. (App. I, J) Such a reading is far outside the strike zone of protected liberty interests.

CONCLUSION

It would appear that the *United Mine Workers* holding which Justice Rutledge found " full of dangerous implications for the future " has born unconstitutional fruit in the City of Detroit

and requires clarification and remedy from this Court. The Court should grant Certiorari to clarify the nature of the the interests protected by the trial court's injunction, including Petitioner Qualls' right to renew his existing business license during the appellate period, and the subsequent impact of a later appellate reading on the actions of City of Detroit officials undertaken at that earlier time to contravene a valid court order. An order to the Michigan Supreme Court preserving Mr. Qualls' prima facia case for civil rights violations earlier recognized by the Michigan Court of Appeals and remand to the trial court for hearing on the merits is necessary to preserve the fundamental constitutional interests implicit in the orderly administration of justice, and preserved in the First, Fourth and Fifth Amendments of the United States Constitution, applicable to the State of Michigan under the Fourteenth Amendment.

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Hon. J.H. Hausner
Wayne County Circuit Court 12/16/88

(2) Supreme Court, U.S.
FILED
991386 JAN 27 2000
OFFICE OF THE CLERK

NO. 99-A457

In The
SUPREME COURT OF THE UNITED STATES
Winter Term, 2000

Glen Qualls, et al.
Petitioners,

v.

City of Detroit, et al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITIONER'SAPPENDIX

Constitutional
Litigation Associates, P.C.
Hugh M. Davis, Jr. (P-12555)
Thomas V. Silvia (P-46610)
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Court of Appeals, State of Michigan

ORDER

Glen Qualls v City of Detroit

Docket Nos. 183373; 183391;195417

LC No. 92-206766 NI; 85-515546 CZ; 94-420312 CZ

Joel P. Hoekstra
Presiding Judge

William B. Murphy
Richard A. Bandstra
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on-

Date September 04, 1998

/s/Chief Clerk

Order

Entered: August 31, 1999

113417
113418
113419

GLEN QUALLS, LETICIA QUALLS, ELIZABETH QUALLS, PAUL SMIGELSKI, and DIANE SMIGELSKI,

Plaintiffs-Appellants,

v 113417

CITY OF DETROIT,

Defendant-Appellee,

and

DONALD ROBINSON, et al,

Defendants.

GLEN QUALLS, Individually and d/b/a HO LEE KOW FIREWORKS FACTORY, and d/b/a FIREWORKS UNLIMITED, LETITIA QUALLS, BERTA E. PEREZ, PAUL A. BRUSSE, individually and d/b/a PYROTECHNIQUES, LTD., d/b/a HO LEE KOW FIREWORKS FACTORY, and FIREWORKS

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

SC: 113417, 113418, 113419
COA: 183373, 183391, 195417
Wayne CC: 92-206766-NI
85-515546-CZ
94-420312-CZ

UNLIMITED,

Plaintiffs-Appellants,

v **113418**

CITY OF DETROIT,

Defendant-Appellee,

and

WILLIAM HART, et al,

Defendants.

GLEN QUALLS, LETICIA QUALLS, and ELIZABETH QUALLS,

Plaintiffs-Appellants,

v **113419**

CITY OF DETROIT, et al,

Defendants-Appellees.

On order of the Court, the delayed application for leave to appeal from the May 26, 1998, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 31, 1999

/s/ Jacqueline B. MacKinnon, Deputy Clerk

Court of Appeals, State of Michigan

ORDER

Glen Qualls v City of Detroit

Docket Nos. 183373; 183391;195417

LC No. 92-206766 NI; 85-515546 CZ; 94-420312 CZ

Joel P. Hoekstra
Presiding Judge

William B. Murphy
Richard A. Bandstra
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on-

Date September 04, 1998

/s/ Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

GLENN QUALLS, LETICIA QUALLS, ELIZABETH QUALLS, PAUL SMIGELSKI, and DIANE SMIGELSKI,

Plaintiffs-Appellants,

v

CITY OF DETROIT,

Defendant-Appellee,

and

DONALD ROBINSON, RAYO BAKER, ALBERTA WHITFIELD, FRANK JACKSON, DONALD PAILEN, RICHARD LANG, GREG PLUMMER, WILLIAM SNEED, and ROBERT P. MICHALAK, et al.,

Defendants.

UNPUBLISHED
May 26, 1998

No. 183373
Wayne Circuit Court
LC No. 92-206766 NI

GLENN QUALLS, d/b/a HO LEE KOW FIREWORKS FACTORY and d/b/a FIREWORKS UNLIMITED, LETITIA QUALLS, BERTA E. PEREZ, PAUL A. BRUSSE, individually and d/b/a PYROTECHNIQUES, LTD., d/b/a HO LEE KOW FIREWORKS FACTORY and FIREWORKS UNLIMITED,

Plaintiffs-Appellants/ Cross-Appellees,

v

CITY OF DETROIT,

Defendant-Appellee/ Cross-Appellant

and

WILLIAM HART, DONALD L. ROBINSON, JAMES BANNON, et al.,

Defendants.

No. 183391
Wayne Circuit Court
LC No. 85-515546 CZ

GLEN QUALLS, LETICIA QUALLS, ELIZABETH QUALLS,

Plaintiffs-Appellants,

v

No. 195417
Wayne Circuit Court
LC No. 94-4203 12 CZ

CITY OF DETROIT, DONALD L. ROBINSON, RAYO BAKER, RICHARD LANG, WILLIAM SNEED, ROBERT P. MICHALAK, DAVID VANN, SANDRA SLAYTON, DONALD BLOOM, SETH DOYLE, O. WILSON, and MARTIN WILLIAM, et al.,

Defendants-Appellees.

Before: Hoekstra, P.J., and Murphy and Bandstra, J. J.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right from various orders of the lower courts dismissing several claims filed against defendants which arose from the events surrounding the denial of defendant Glenn Qualls' application for a license to sell fireworks in the City of Detroit for the 1985 fireworks season. Defendant City of Detroit cross-appeals from an order of the lower

court that declared portions of the Detroit City Code preempted by state law. We affirm.

Our Supreme Court in *Detroit v Qualls*, 434 Mich 340; 454 NW2d 374 (1990) *("Qualls' I")*, and a panel of this Court in *Qualls v Detroit ("Qualls II ")*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 1991 (Docket Nos. 93518, 115434, 118836, 118837, 118908, and 94209), discussed the underlying facts and procedural history surrounding these cases. Any additional facts that are necessary to resolving these cases will be discussed below.

Plaintiffs first argue that the lower court erred in finding that defendant City of Detroit did not violate plaintiff Glenn Qualls' right to due process in denying his application for a license to sell fireworks for the 1985 fireworks season. Qualls was properly licensed for the 1984-1985 fireworks season; however, this license expired on February 28, 1985, and Qualls did not apply for renewal of the license until, at the earliest, March 16, 1985, when he filed a licensing fee for the following fireworks season. On April 22, 1985, defendant Esther Shapiro notified Qualls that his application had been rejected because, among other reasons, he had previously violated the city code. Qualls was not afforded notice or a hearing before the denial of his application.

Detroit Code § 30-1-14 provides that "[u]nless the interested city departments notify the consumer affairs department of an existing violation at least (15) days prior to the expiration of the licenses, the licenses will be renewed." Plaintiffs rely upon § 30-1-14 to argue that because Qualls' license should have been automatically renewed absent an "existing violation," Qualls had a vested property interest in his license that entitled him to notice and a right to be heard before a decision was made to deny his license application. We disagree. Although Qualls eventually sought renewal of his license, he did so only after the license had expired. Accordingly, Qualls' belated request for license renewal caused Qualls' to lose any property interest that he might otherwise have had in the license.

Both the federal and state constitutions provide that no

person shall be deprived of life, liberty, or property without due process. US Const, Am V; Const 1963, art 1, § 17. Our Supreme Court has held that the holder of an occupational license has a property interest in that license and is entitled to due process protection before either the revocation of the license or the denial of an application for renewal of the license. *Bundo v City of Walled Lake,* 395 Mich 679, 695; 238 NW2d 154 (1976). Such licensees are entitled to "rudimentary due process," which entails notice of the proposed action and the reasons given for this action, a hearing in which the licensee may present evidence and testimony and confront adverse witnesses, and a written statement of findings on the part of the body taking the action. *Id.,* 696-697. However, in *Eastwood Park Amusement Co v Mayor of East Detroit,* 325 Mich 60, 74-75; 38 NW2d 77 (1949), our Supreme Court cited with approval *State v Minneapolis-St Paul Metropolitan Airports Comm,* 223 Minn 175, 187; 25 NW2d 718 (1947), where the Minnesota Supreme Court held that "[a] prior expired license is *functus officio* and confers no rights upon the licensee named therein . . . . In such cases, [the licencee's] application for a license stands upon the same basis as if [he] never had been licensed." We agree with the lower court that Qualls' license expired by its own terms on February 28, 1985, and that Detroit Code § 30-1-14 did not give Qualls a continuing property interest in his license. Accordingly, Qualls was afforded all the process that he was due under the circumstances.

Plaintiffs next argue that certain portions of the city code relating to fireworks are unconstitutionally prohibitory rather than permissibly regulatory. In *Qualls I* our Supreme Court stated that "[i]t is well established in Michigan that ordinances are presumed valid and the burden is on the person challenging the ordinance to rebut the presumption." *Qualls I supra,* 434 Mich 364. Further, "[w]hen the action relates to matters of economics or general social welfare, the test to determine whether the law comports with due process is whether it bears a reasonable relation to a legitimate governmental purpose." *Id.,* 365. Thus, our inquiry is limited to whether any state of facts either known or which could reasonably

be assumed affords support for the legislative action. *Id.*, 366. And although such facts might be debatable, the legislative judgment must be accepted. *Id.* After applying this standard to the challenged code provisions, we conclude that plaintiffs have failed to rebut the presumption. of validity afforded to the provisions. Accordingly, the lower court did not err in finding that the challenged code provisions are not unconstitutionally prohibitory.

Plaintiffs next argue that the state law regulating fireworks, namely, *MCL* 750.243a; MSA 28.440(1), is preempted by federal law, and that provisions of the state law are unconstitutionally vague and therefore void. This Court, however, recently rejected both of these challenges to the state fireworks laws in *Stajos v Lansing*, 221 Mich App 223; 561 NW2d 116 (1997). Accordingly, we decline to consider the merits of plaintiffs' claims any further.

Plaintiffs next argue that the lower court erred in finding "that the introductory prohibitory language in MCL 750.243a(2)(d)'s list of prohibited chemicals was evidence of legislative intent to totally prohibit consumer fireworks." We find that plaintiffs have mischaracterized the lower court's ruling. The lower court did not interpret MCL 750.243a(2)(d); MSA 28.440(1)(2)(d) as evidence of legislative intent to prohibit all consumer fireworks. Instead, the lower court "construe[d] MCL 750.243a[; MSA 28.440(1)] to be a general proscription against fireworks" unless excepted by the statute. We conclude that the lower court's interpretation of the statue is accurate.

Plaintiffs next argue that the lower court erred in dismissing their claims against defendants sounding in civil rights violations. We have reviewed the reasons set forth by the lower court and conclude that the lower court did not error in dismissing plaintiffs' claims. Although the record reveals that various defendants engaged in contemptuous conduct, we agree with the lower court that plaintiffs failed to establish the existence of any actionable civil rights violations. Accordingly, for the reasons stated by the lower court, plaintiffs' claims were properly dismissed.

Plaintiffs next invite this Court to reconsider the panel's decision in *Qualls II*, where it finalized a June 27, 1989, interim

order that declared that the "shipped directly out of state provision" in MCL 750.243a(3)(g); MSA 28.440(1)(3)(g) referred to shipment by common carrier only. *Qualls II, supra.* We decline plaintiffs' invitation to engage in this analysis because this issue is controlled by the law of the case doctrine, which states that the decision of an appellate court is controlling at all subsequent stages of litigation, so long as it is unaffected by a. higher court's opinion. *Reeves v Cincinnati, Inc (After Remand),* 208 Mich App 556, 559 (1995). Further, the law of the case doctrine generally applies regardless of the correctness of the prior. decision. *Id.* Although plaintiffs contend that amendments to the Motor Carrier Safety Act, namely, MCL 480.13; MSA 9.1666(3) and MCL 480.15; 9.1666(5), warrant reconsideration of this Court's previous decision, we are not persuaded that the statutory changes justify ignoring the law of the case doctrine.

On cross appeal, defendant City of Detroit argues that the lower court erred in declaring that certain provision of the city code are preempted by state law. We disagree. The lower court found that former § 19-3-64(a)(6) and (7), which prohibit the unlicensed sale of specific types of cone fountains, cylinder fountains, and smoke devices, are preempted by MCL 750.243a(3)(d) and (e); MSA 28.440(3)(d) and (e), which provides that a permit is not required in this state to, sell cylinder fountains and toy smoke devices. Detroit Code § 19-3-64 has since been amended to ban the sale of all cylinders and all smoke devices.

In Qualls I, our Supreme Court stated that "[a]bsent a showing that ... the ordinance permits what the statute prohibits or prohibits what the state permits, [t]he mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements." *Qualls I, supra,* 434 Mich 361-362, citing 56 Am Jut 2d, Municipal Corporations, § 374, pp 408-409. We find that plaintiffs established that § 19-3~64(a)(6) and (7) prohibit what the state fireworks statute expressly permits. That is, the state statute expressly permits the unlicensed sale of cylinder fountains and toy smoke devices, while the Detroit Code prohibits such sales. Accordingly, we affirm the

decision of the lower court that declared that former § 19-3-64(a)(6) and (7) is preempted by state law.

Affirmed.

/s/Joel P. Hoekstra
/s/William B. Murphy
/s/Richard A. Bandstra

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, et al.

Plaintiffs,

Case No. 85-515546-CZ
Honorable Louis F. Simmons, Jr.

-v-

THE CITY OF DETROIT, et al.

Defendants.

OPINION DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF MAY 1, 1992 ORDER AND GRANTING IN PART AND DENYING IN PART REQUESTS FOR DECLARATORY JUDGMENT PRESENTED IN PHASE I TRIAL

At a session of the court in the Lafayette Building
in the City of Detroit, County of Wayne, State of Michigan
on April 28, 1993, Hon. Louis F.Simmons presiding.

OPINION

1. Introduction

This case at bar is an action for damages and declaratory judgment brought by, *inter alia,* the plaintiff Glen Qualls against, *inter alia,* the City of Detroit.[1] The case at bar, itself, emanates from the denial by the City of an application by plaintiff for a license to sell fireworks at retail during the 1985 fireworks season. On a wider front, however, the case at bar is only one, albeit perhaps the final one in a series of legal contests between the parties over plaintiffs' attempts to sell fireworks within the City, and his efforts to challenge the City's regulation of the retail sale of fireworks within the City.

Presently the Court is concerned only with that part of plaintiffs' case in which he challenges the validity of all or part of the City's ordinance which regulates the sale of fireworks within the City. City of Detroit Ordinance, sections 19-3-62, *et seq* (hereinafter the Fireworks Ordinance). Impacting on this Court's inquiry in this regard, however, are appellate opinions rendered by the Supreme Court in a related case, *Detroit v Qualls,* 434 Mich 340 (1990) stay vacated, 437 Mich 1017 (1991) *(Qualls, I),* and by the Court of Appeals in the case at bar, *Qualls v Detroit,*

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[1] Other persons were named as plaintiffs and defendants. Given the subject matter of the present proceedings, reference in this opinion need only be made to the main protagonists.

unpublished opinion per curiam of the Court of Appeals, decided March 6, 1991 {Docket Nos. 93518, 115434, 118836, 18837, 118908), *Iv den*, 437 Mich 1017 (1991) *(Qualls, II).* Indeed the present proceedings in this case are largely the result of the order of remand issued by the Court of Appeals in *Qualls, II.* Before proceeding with determining the merits of the various challenges by the plaintiff, a brief discussion of the holdings of *Qualls I* and *Qualls II* is appropriate.

Qualls I, grew out of an attempt by the City to prosecute the plaintiff for violating that part of the Fireworks Ordinance which limits the storage of fireworks in a place of retail to a gross weight of less than 100 pounds.[2] Trial proceedings were held in the Thirty-Sixth District Court. The plaintiff argued that the weight limitations conflicted with state law, under which no limit was stipulated as to the amount of class B or class C[3] fireworks a retailer could sell and store. See MCL 750.243a, *et* seq, and that the 100 pound limitation was unreasonable in view of his contention that he did not store class B fireworks at his retail store. *Qualls I, supra,* 435.

The District Court dismissed the charges because it found that the weight limitation to be invalid on the basis that plaintiff

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Section 19-3-70(b) states in pertinent part the storage of fireworks in a place of retail sales shall be limited to a gross weight of less than one hundred (100) pounds...

3

The terms class B or class C fireworks are defined, inter alia, MCL 705.243a(1)(b)(c) respectively. Generally Class B fireworks are more powerful and volatile than Class C fireworks.

did not store class B fireworks at his store and the weight limitation was thus not rationally related to the City's interest in the safety and health of the City's residents. The District Court did not reach the preemption issue. *Qualls, supra,* 345.

After a tortious (sic) appellate history, the Supreme Court ultimately reversed the District Court's finding. Initially the Court took up the issue of preemption, and held that the storage limitation was not preempted by state law. *Id,* 361-364. In doing-so the Court expressly recognized that:

> the retail sale and storage of fireworks raises concerns that are local in character, i.e. the location of retailers with respect to densely populated areas, the number of retailers in an area, the amount of use of the materials, and the conflict between the dangers of fireworks and the use of these materials in the community. As hazardous materials, the very nature of fireworks lends itself unquestionably to regulation adapted to local conditions. *Id,* 363.

Additionally, the Court expressly rejected the rationale advanced by the plaintiff to the effect that that which the state legislature does not prohibit it impliedly permits. *Id,* 364.

The Court then went on to find that the storage limitation was constitutional. In discussing the nature of plaintiff's challenge and the rationale of the District Court, the Court noted that in order to sustain the weight limitation's constitutionality the test is whether it is rationally related to a legitimate government purpose. *Id,* 365. The Court then went on to find that:

> The purpose of the storage limitation is to prevent fire and explosions and, thus, to

> protect the safety of the people, homes, and businesses in the city. This is clearly a legitimate purpose, and a limitation on the amounts of fireworks which a retail establishment can store within a city bears a rational relationship to public safety.

The Court then examined plaintiff's contention that the weight limitation was unconstitutional as applied to him because he, allegedly, only stored class C fireworks, as opposed to class B fireworks, and that the storage of the former did not pose any danger. He sought to prove the latter proposition through expert testimony. The Supreme Court rejected this argument and the District Court's conclusion. The Supreme Court, after noting that it was plaintiff's burden to rebut the presumption of rationality (and hence constitutionality), held that:

> in the face of a due process or equal protection challenge, 'Where the legislative judgment is drawn in question, a court's inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." ... A corollary to this rule is that where the legislative judgment is supported. by *"any state of facts either known or which would reasonably be assumed,"* although such facts may be "debatable," the legislative judgment must be accepted. *Id.* 366. (Authorities omitted).

The Court then explained that "whether the defendant (i.e.

Qualls) did or did not store class B fireworks was not determinative of the constitutional question." *Id,* 367. The. Court went on to cite evidence on the record that suggested some basis of "facts either known or which could reasonably be assumed" which would justify the weight limitation. *Id,* 367-368. The Court then upheld the constitutionality of the storage provision of the Fireworks Ordinance. *Id.*

The Court, however, stayed the effect of its ruling until the resolution of the proceedings in *Qualls II.* Id, 369. The Court also noted that it expressed no opinion as to the trial's court's ruling in *Qualls II,* that the Ordinance was "invalid in its entirety when addressing the sale and storage of items which under state law a person needs no permit to sell and store, and these items which can be sold for direct shipment out of state without a permit under state law," noting that this ruling was the subject of appellate proceedings in *Qualls, II. Id,* 434 Mich 344, N 4. After *Qualls II* was decided the stay was vacated. *Qualls v Detroit,* 437 Mich 1017 (1991).

Qualls, II emanated from various rulings previously made in the case at bar. In *Qualls II,* the Court of Appeals, after noting the various holdings in *Qualls I,* went on to find that the issues presently before it were

> Whether the state statute has preempted the field of fireworks, regulation with respect to licensure of fireworks retailers and, if it has not, whether the ordinance provision concerning such licensure is otherwise constitutionally valid.

The Court of Appeals then, after noting that

regulation and licensing of the sale and storage of fireworks were within the police powers of a municipality, *Id,* slip Op, 4, went on to hold that the licensing provision of the Ordinance (section 19-3-67) did not conflict with state statute and was not preempted by it. *Id 6.*

The Court of Appeals then noted that previous rulings of the trial court had been made assuming that the ordinance as a whole was invalid, and this ruling (or assumption) was incorrect, and that therefore "almost of the trial court's findings must be revisited." *Id.* Also the Court of Appeals noted that:

> Furthermore, once the trial court determined that the ordinance in its entirety was invalid, it was not necessary for the court to address ... whether, under a regulatory scheme that has overall validity, there are portions of the ordinance that may post constitutional problems. *Id*

Some of these issues identified by the Court of Appeals were whether the ordinance could be held invalid on the grounds that it does not state an adequate standard for the guidance of the official who is vested with the authority to determine who may be issued a license (referred to by the parties and the Court as the "standards issue,.") *Id,* 6-7. Also identified was whether the provision section 19-3-67(c) requiring the applicant to procure a bond or insurance in the amount of $100,000.00 property coverage and $300,000.00 personal injury coverage, with the City as a named insured constitutes a valid and reasonable exercise of the City's police power or if it amounts to a prohibiting of fireworks sales within the City. *Id.* The Court of Appeals cited *People v Buff Corp,* 94 Mich App 179 (1979) as a case which contained controlling principles. *Id,* 7-8.

The Court of Appeals also noted that if the trial court found that there were sufficient standards, then the trial court would also need to examine the record .keeping requirements of section 19-3-68 to determine whether they were reasonable or whether they were designed to prohibit rather than regulate the sale of fireworks. Id, 8.

Finally the Court of Appeals revisited an interim order in which it vacated a prior ruling of the trial court which held that pursuant to MCL 750.243a(3)(g) a retailer could sell fireworks to customers for direct shipment and use out of state, and that merchandise sold as such, when under 1,000 pounds did not require special packaging. The Court of Appeals reaffirmed its earlier determination that the statute only permitted such sales to be made when shipped by common carrier only and that a customer merely signing a form averring that the fireworks would be transported and used out of state was not in compliance with the statute. Id, 9.[4]

2. Plaintiffs Motion for Reconsideration of May 1, 1992 Order

Upon remand this Court determined to initially resolve-plaintiff's remaining challenges to the validity of the Fireworks Ordinance. This Court resolved the standards issue on the City's motion. In an order dated May 1, 1992, the Court held that while section 19-3-67, alone would be too vague to pass constitutional muster, nevertheless the standards for the grant, denial, suspension

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[4] The remainder of *Qualls II* concerns issues not relevant to the proceedings now before this court,

or revocation of a license contained in the City's general ordinance concerning the issuance of licenses. see Detroit Ordinance. section 30-1-1. et seq, (hereinafter the Licensing. Ordinance), specifically. section 30-1-16, did contain constitutionality adequate standards. and that these provisions would apply to the City's determination of whether a fireworks license would be granted, denied, suspended or revoked. The plaintiff filed a motion for reconsideration. the merits of which the Court shall now address.

Plaintiff contends that the Licensing Ordinance itself is unconstitutional and thus cannot be used to provide adequate standards for the implementation of the licensing provisions of the Fireworks Ordinance. He asserts that the Licensing Ordinance violates procedural due process because it does not require the City to issue a notice of intent to suspend an existing license when the City becomes aware of facts which will ultimately cause it to deny any application for renewal or otherwise. He argues that this effectively denies a licensee, including himself, of the right to a hearing before the suspension or revocation of a license.

The factual context of this argument appears as follows. In 1984 plaintiff had obtained a fireworks retail sale license. The duration of the license was from March 1, 1984 through February 28,1985. Apparently he did not attempt to apply for a license for the 1985 - 1986 year until a letter to that effect was sent to the City's consumers affairs department on April 16, 1985. He had also filed a licensing fee for the 1985-1986 year on March 16, 1985. On April 22, 1985, Esther Shapiro, the head of this department, sent plaintiff a letter in which she stated his license application was denied and gave several reasons. Apparently plaintiff did not seek an administrative hearing to challenge her decision.

The Licensing Ordinance provides that upon the denial of an application for a new license an applicant may request

a hearing before the head of the department to contest the denial. Section 30-1-17(a). In point of fact it appears that plaintiff had successfully utilized this procedure in former years to obtain fireworks licenses after an initial denial.

The Licensing Ordinance, however, also provides that before suspending or revoking an existing license, the department must notify the licensee of its intent to suspend or revoke the license, and to set up a show cause whereby the licensee can contest the suspension or revocation. Section 30-1-17(b),(d).

For purposes of procedural due process, it has been held that prior to a revocation or suspension of a license a licensee has a right to notice and an opportunity to be heard but that an applicant for a new license has no similar entitlement. *Bisco's, Inc. v Liquor Control Comm'n*, 395 Mich 706, 718, N15(1976). On its fact the Licensing Ordinance satisfies this constitutional constraint. While the Licensing Ordinance does not address procedures that must be invoked for denials of filed applications for license renewals, case law has held that once a timely application for a license renewal is made, due process requires notice and a hearing prior to revocation or failure to renew. *Detroit v Mashlakjian*, 15 Mich App 236 (1968). In other words under case law the denial of a timely filed application for renewal is considered the equivalent of the denial of an existing license with the attendant due process protection.[5]Because the Licensing Ordinance does provide

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5 By way of contract a license that is allowed to expire confers no greater rights on the former licensee than had the licensee who filed for a new license. See for example *Eastwood Amusement Co. v. Mayor of East Detroit* 325 Mich. 60, 74-75 (1949) quoting with approval, *State ex rel. Interstate Air Parts, Inc. v. Minneapolis- St. Paul Metro Airports Comm.* 223 Minn. 175, 187, 25NW 2d 718, 726 (1947); also see *Voettiner v. Comm. of Education*, 376 NW2d 444 (Minn. App. 1985.)

adequate procedures for the renewal or revocation of an existing license, it would appear that it would also provide adequate procedures for the denial of timely filed applications for license renewals. The Licensing Ordinance would therefore appear to have, at least on its face, sufficient procedural due process protections which preserve a licensee's right to a hearing prior to a denial or a suspension when the licensee (or applicant) is entitled to one.

Plaintiff's argument that there is a duty to inform him of grounds and intent of a denial or revocation of a license when the City obtains that knowledge, and to immediately grant him a hearing is not supported by any authority. Nor does it make much sense. Certainly the City has no sure way of knowing whether a prospective applicant or a licensee will in fact seek a license or a renewal of an existing license. No law cited by the plaintiff imposes on it the duty to foretell the future acts of third parties. Rather its duty to provide a hearing depends entirely on the status of the person when he or she makes an application. It is only when the person has timely filed an application for renewal that a pre denial hearing must be given. Otherwise a denial citing the reasons for denial, along with affording an opportunity for a post denial hearing is sufficient under due process.

Plaintiff's argument is also flawed in that it attributes the City's failure to notify him of grounds or intent to deny promptly upon its receipt of such knowledge as somehow controlling whether he is entitled to a pre-denial hearing. This is not so. A licensee, by timely applying for a license renewal can preserve his or her rights to a pre-denial hearing. The licensee, who allows an existing license to lapse, however, has no such rights, and as pointed out above, is treated in law as a new applicant. *Voettner*, supra. In the case at bar, therefore, whether plaintiff was entitled to a pre denial hearing, depended largely on his own diligence, and

licensee, by timely applying for a license renewal can preserve his or her rights to a pre-denial hearing. The licensee, who allows an existing license to lapse, however, has no such rights, and as pointed out above, is treated in law as a new applicant. *Voettner*, supra. In the case at bar, therefore, whether plaintiff was entitled to a pre denial hearing, depended largely on his own diligence, and not on the acts of the City.

Plaintiff also argues that the City was estopped to deny him the 1985 license because of the ruling of the district court in *Qualls I* that the storage requirement was unconstitutional. While this issue is somewhat off the point of whether the Fireworks Ordinance or Licensing Ordinance affords procedural due process, nevertheless the Court addresses it.

The Court finds that the City was not estopped to enforce its Fireworks Ordinance after the District Court made its ruling and dismissed the charges against plaintiff in *Qualls I*. No authority is cited by the plaintiff to support his conclusion. In any event no injunctive order was ever issued by the District Court which implemented the holding, and indeed in these proceedings apparently the plaintiff never sought enforcement of the District Court's finding. There being no order specifically enjoining the City from enforcing the Fireworks Ordinance, it cannot be said that the City was somehow prohibited from enforcing the Fireworks Ordinance.

Also, as a practical matter, this Court would note that the District Court's order was reversed by the Recorder's Court on May 23, 1985. *Qualls I*, supra, 352, N 20. Therefore before the 1985 fireworks season commenced, the effect of the District Court's order had been completely vitiated.

For all the reasons stated above, the Court will deny plaintiff's motion for reconsideration of the May 1, 1992 order.

Next the Court turns to the remaining legal issues

left unresolved in *Qualls II*. In order to do this a trial was held (hereinafter referred to as the Phase I trial) and the Court has received proposed findings of fact and law as well as post trial briefs of the parties.

3. Other Licensing Provisions are Reasonable and are not Prohibitive

The Court first reviews whether the bond or insurance requirement of the licensing section of the Fireworks Ordinance section 19-3-67 is a constitutional exercise of the City's police powers or whether it amounts to a prohibiting of fireworks within the City. As to this issue, plaintiff has essentially conceded, in his Proposed Findings, etc., pp 41-43, that the insurance provision is not prohibitive and is valid. Indeed the facts show that plaintiff has routinely been able to secure coverage far in excess of the ordinance requirements. For example in 1983 he obtained a $2 million policy for personal liability and property damage coverage for $453.00.

Next considered are the record keeping requirements of section 19-3-68, which states:

> Every person licensed as a resident retail seller, wholesale dealer or jobber in fireworks shall keep a permanent record, in which the sale shall be recorded, at the time of the sale, a description of the fireworks, pyrotechnics or other explosives of like character, names, ages, addresses and personal descriptions of all purchasers, together with the hour and date of such sale. No entry shall be

> obliterated or defaced, and such record shall be open and available to the inspection of any member of the police and fire departments of the city.

The Court of Appeals, in *Qualls II*, supra, 8, directed this Court to

> decide whether the record keeping requirements for licensees are reasonable or whether they are designed to prohibit rather than regulate the sale of fireworks.

In determining whether the record keeping requirement is reasonable, the Court's analysis is initially concerned with whether there is a rational basis for the requirement. The Court rejects plaintiff's suggestion in his ***Proposed Findings, etc***, p 44 that none can be conceived. The record keeping provision is rational since it can facilitate the identification of the cause of fireworks injuries and fires caused by fireworks. Also it aids in the enforcement of other provisions in the Fireworks Ordinance that prohibit the sale of fireworks to minors. Mindful of the presumption of reasonableness and the broad test for determining whether the ordinance has a rationale, the Court concludes that the records keeping provision is a reasonable exercise of the City's police powers.

The other concern is whether this provision, even if it has a rational purpose, is so restrictive as to amount to a prohibition of the activity. The testimony adduced at trial indicated that the record keeping requirements could be accomplished through the use of computerized cash registers at the cost of between $2,500.00 to $6,000.00. In lieu of these additional part-time employees, hired at a cost of between $3.50 to $5.00 per hour could be retained to perform the record keeping requirements.

Plaintiff testified, in a somewhat conclusory fashion, that the record keeping requirement would be impractical due to the high volume nature of his business during the peak periods of sales. To corroborate this he offered the affidavits of other retailers of fireworks who did business outside the city. These vendors all conclusorily opined that they could not operate profitably under such a requirement. As to the probative value of such evidence the Court notes that it is largely unsupported by any sort of detailed cost analysis. Assuming for the sake of argument that the business in peak periods is high volume in nature, the Court finds that the hiring of temporary additional help at minimum wage would be a comparatively cheap method of complying with the record keeping requirements[6].There is simply no convincing showing why hiring such help would not solve the problem. The Court therefore finds that the record keeping requirements are not unduly economically prohibitive.[7]

Plaintiff additionally asserts that the licensing fee mandated by section 19-3-67(d), and set under the Licensing

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It should be noted that the fireworks season, as described by the parties is comparatively brief in duration, lasting as it does from Mid-June through the Fourth of July. The Amount of money spent on extra help thus would not be great.

Plaintiff called attention to the fact that his expert testified that he knew of no other similar requirements for the sale of retail fireworks. Yet the expert also admitted not being familiar with the retail aspect of the industry. In any event the fact that others may not impose such a requirement says nothing about whether the City's decision to have such a requirement is reasonable.

Ordinance is unreasonable and prohibitory. Facts relevant to this argument appear as follows. Prior to 1982 the licensing fee for fireworks licenses was set at $50.00. Pursuant to section 30-1-18(a)[5] the director of consumer affairs undertook to review the fee schedule in view of the factors cited in that section. Pursuant to their study the fee was set at $250.00. There is no proof before the Court that this fee was itself based on anything other than the actual costs associated with administering the licensing of fireworks dealers.

In 1987 the fee again was raised to $750.00. In 1992 it was raised to $1,000.00 with the provision of an automatic increase in 1993 of 15% to $1,150.00.

The director of the consumer affairs department, Esther Shapiro, testified that the increases were at her recommendation after discussion with the agencies of the City that were charged with enforcement. Notably her recommendation for the increase with respect to fireworks dealers was made in conjunction with other types of businesses (such as cabarets, carnivals, hall-taxi dance (sic), motor vehicles for hire, adult theaters, and used auto and wrecking dealers which were thought to have a greater

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[5] This Section states: (a) a non-refundable license application fee shall be charged for any establishment, trade, business or occupation licensed under this code or city ordinance. An application fee schedule shall be established by the director of consumer affairs or director of other departments with licensing functions, based on the actual cost of issuance, enforcement and administration of the licensing regulations for the particular industry, establishment, business or occupation to be licensed. This schedule shall include the annual expiration date of each license. (emph. added)

administrative costs). Shapiro testified that these discussions were conducted by an administrative assistant upon whose recommendations she relied.

Plaintiff's expert, Dr. Conkling testified that the licensing fees in other locations are much lower, but that Tennessee charges $750.00. He had no opinion as to whether the City's fee was for cost recovery or intended to be restrictive.

Plaintiff opined that the fee, in conjunction with the other restrictions in the Fireworks Ordinance would make it economically infeasible for him to operate his business. His business, however, is only operated for a short period of time during the fireworks season. He admitted that party or convenience stores, who conducted business all year round, would be able profitably to sell fireworks.

Also the court notes in the various affidavits submitted by plaintiff as an offer of proof shows that **one prospective retailer**, Aziz Naser, attempted to file a licensing fee of $1,000.00 on June 6, 1992. This fee **was rejected** as being untimely. (emph. added)

Preliminarily the Court rejects plaintiff's challenge to the **veracity of Shapiro's testimony. While it may be that she, herself, was not a fireworks enthusiast and did not believe in their social utility, nevertheless it is difficult to ascribe her personal motivations to the increase in license fees.**(Emph. added.) As noted above the license fee increase for fireworks retailers was accompanied by a similar increase in fees for a variety of other business where the cost of administering the license and business is high. In reviewing the issue, the Court notes that plaintiff does not so much challenge the authority of the City to impose a licensing fee, but rather the reasonableness of the

amount. As to this, the following principles, as summarized in 53 CJS, Licenses, sec 23, pp 353, 353-354, 354, 355, 355-356, 356-357 are controlling:

> The amount which may be exacted may include, and must be limited and reasonably measured by, the necessary or probable expenses of issuing the license, and of such inspection, regulation, and supervision as may be lawful and necessary ....
>
> Thus, if it is **manifest** that the **amount imposed** is **substantially in excess of, and out of proportion to, the expenses involved,** it generally will be regarded as a revenue measure, and be **held unreasonable and void** as a **regulation under the police power**, particularly where the act or ordinance makes no provision for inspection or regulation of the business and expressly provides for use of the funds for other purposes. (Emph. added) A mere incidental excess, however, which is not so disproportionate as to make the fee charged unreasonable, or the mere probability that the license fee may exceed, in some degree, the expenses involved, does not invalidate the act, or ordinance imposing it ....
>
> Unless the contrary appears on the face

of the act or ordinance imposing a license or occupation tax or is established by evidence, such tax is presumed by the courts to be reasonable and to be imposed for a lawful purpose; and all doubts should be resolved in favor of its reasonableness.

The party attacking a license fee or tax generally has the burden of proving it to be unreasonable or confiscatory.

If a license fee or tax is so high as to be virtually confiscatory or prohibitive of a useful and legitimate occupation or privilege, or to create a monopoly for the benefit of a few, the act or ordinance imposing it is invalid.

The determination of the reasonableness of the amount of a license fee or tax ordinarily rests within the discretion of the legislative power imposing it, and the courts usually will not interfere with the exercise of such discretion ... unless it is clearly apparent there has been an abuse of discretion, and that the fee or tax is arbitrary, unreasonable, oppressive, or prohibitive.

Among the factors which a court considers in deciding whether a license fee is reasonable are necessary

> inspections, enforcement of police, fire, sanitary, and zoning laws, and administrative processing costs. Among other matters considered are the size of the city or village and the amount of business which would probably be done by the licensee.
>
> Where it is necessary in the proper conduct of business that usual demands be made on a city's facilities, a reasonable charge may be made by the municipality to cover its actual expense in providing such special services. However, a license fee is not confiscatory by reason of the fact that the licensees do not receive an equivalent in personal benefit. (Footnotes and authorities omitted).

In view of the foregoing, it is obvious that plaintiff's proposed conclusion of law, that the fee is unreasonable, cannot be adopted. First, it is premised on the belief that the City has the burden of showing reasonableness. Also plaintiff's analysis is premised on there being no exact showing that the fee is representative of costs involved. The above-stated principles show that these are mistaken.

Beyond this the Court is satisfied that there is an adequate basis for concluding that the fee is not unreasonable. True, no exact cost figures were submitted. Nevertheless, based on the discussion held by Shapiro or her assistant, it can be deduced that the fee reasonably approximated the cost to the City in regulating

the sale of fireworks. It should be noted that the Fireworks Ordinance contemplates that inspections will be made by the fire department to insure proper operation of the business. Also the operation of a retail fireworks business, as pointed out in *Qualls I*, does involve a certain level of danger to the public in the form of an increased risk of harm from fires and explosion. The nature of the business would thus make it probable that in any given season the storage of fireworks could result in the use of the City's fire and police department.[9] Additionally, as to the 15% increase for the subsequent years, the Court does not find this to be so disproportionate as to what many assumed to be the rising costs of the City as to make the fee unreasonable. As to this the Court would only reiterate the foregoing principle that the test of reasonableness is not dependent on mathematical exactness.

Moreover the fees imposed are not prohibitory in nature. The Court discounts plaintiff's conclusory assertion that he could not possibly operate under the fees. This assertion is belied by the fact that at least one other retailer attempted -- and thus was willing to pay, the fee, and also by plaintiff's own testimony that a party store operated year round could sell the items profitably. Thus even if the plaintiff's assertion that he could not run his current operation at a profit under the licensing fee were true, the cause of this is not the fee itself, but plaintiff's peculiar mode of operation.

For all the reasons stated above the Court finds that the

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[9] Indeed the Court notes that the plaintiff's storage facility in Romulus was the target of arson and the resulting fire caused approximately $22,000 in damage.

license fee is reasonable and not prohibitory.[10]

4. Miscellaneous Arguments[11]

A. Storage

Plaintiff also challenges the validity of various portions of the Fireworks Ordinance which pertain to the storage of fireworks.

One such challenge is to the requirement in section 19-3-70(b) that the storage of fireworks in retail stores must be stored in a Type 2 Indoor Magazine. Plaintiff, however, concedes that he has such a magazine, and has had one since the early 1980's. Plaintiff has not provided to the Court any evidence which would show that there are any special costs in maintaining the magazine. In short plaintiff has not demonstrated that he would be adversely

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10 Plaintiff, in his Proposed Findings, p 41 also states arguments concerning the validity of section 19-3-67(b) which provides that " no license .shall be issued for any location within 500 feet of any school property." But he concedes that his business is not within 500 feet of school property. He therefore has no standing to challenge this portion of this section. See generally, 16 Jur 2d Constitutional Law, § 191, p 595. The Court therefore finds it unnecessary to address the validity of this portion of section 19-3-67(b).

11 Plaintiff, in his Proposed Findings, supra, 31-32, addressed section 19-3-65 which pertains to permits for public displays. This case, however, does not involve the issuance of such permits. Nor apparently, has plaintiff sought such a permit. He has no standing to question section 19-3-65. 16 Am Jur 2d, *supra*. The Court need not pass on the merits of his arguments.

affected by enforcement of this section of the Fireworks Ordinance. This issue is therefore moot and the Court need not address the merits. 16 Am Jur 2d Constitutional Law, 164, pp 551. In any event, the Court finds that there is a rational basis for having a special storage.

It is reasonable to believe that such a facility would tend to reduce the dangers, of at least, fire spreading to stored fireworks, or in the alternative to reduce the dangers of theft of fireworks. Moreover the costs of constructing such a facility are not especially great, if the cost is apportioned over time. Plaintiff's argument that this could essentially eliminate curbside or itinerant sellers of fireworks does not lead to the conclusion that this section is unduly prohibitive. First, it is unclear that plaintiff himself has any standing to make the argument since he is not such a vendor. In any event plaintiff cites no law to the effect that merely because an ordinance makes it unprofitable to conduct a business in a certain manner makes it unduly prohibitive in this regard it very well could be that the City wanted the retail sale of fireworks to be done at a fixed location by an established business. Such an intent would be reasonable since it would tend to facilitate the City in ensuring compliance with the other provisions in the Fireworks Ordinance. For all the above reasons the Court finds that part of section 19-3-70(b) which requires the storage of fireworks in a special facility reasonable and not prohibitive and accordingly valid.

Next the Court addresses plaintiff's contentions concerning the validity of the 100-pound limitation for the storage of fireworks at the place of retail. Preliminarily there is a serious question as to whether this Court can address the substantive merits of the argument in light of our Supreme Court's holding in *Qualls I* that the 100-pound limitation satisfied the rational basis test and thus was constitutional.

Of course, under the rule of *stare decisis*, this Court would

be precluded from deciding the issue contrary to how *Qualls I* was decided. See *Topps-Toeller, Inc v Lansing*, 47 Mich App 720; 727-729 (1973), *lv den*, 390 Mich 788 (1973). Plaintiff, however, argues that the Supreme Court did not intend its holding to be the last word on the issue because it entered a stay pending resolution of *Qualls II*. Plaintiff argues that by doing so the Court essentially invited the Court of Appeals in *Qualls II*, and inferentially this Court on remand, to revisit the issues. Plaintiff's argument is without merit. First any reliance on the stay is misplaced since the Supreme Court vacated its stay before *Qualls II* was remanded to this Court. Also the purpose of the stay was not to invite further argument on the issue of rationality of the weight limitation but rather to allow its decision to become effective simultaneously with that of *Qualls II*, in order to prevent further litigation in *Qualls I*, since, as a practical matter many legal issues that could have been raised in *Qualls I*, on remand to the District Court, were then in the process of being decided in *Qualls II*. The stay was implemented therefore as a measure of judicial economy, and not an invitation for further litigation of issues already decided. Thus there is simply no basis in *Qualls I* (or in *Qualls II)* to find that the Supreme Court's decision in *Qualls I*, should not be accorded *stare decisis* effect.

The other ground advanced by plaintiff for not following *Qualls I*, is evidential in nature. Apparently plaintiff argues that the Supreme Court misapplied the testimony of the trial proceedings. Also plaintiff asserts that through his own testimony and that of others, as well as offers of proof, it can now be firmly established that no retailer, especially himself, stores class B with class C explosives at a place of retail, and that only class C fireworks are stored there. Thus there is no evidential base for the Supreme Court's holding.

These arguments also have no merit. First, it is not

for this Court to determine whether the Supreme Court has accurately assessed the record before it. Any such arguments are more appropriately made (or should have been made) before the Supreme Court. Second, as the Supreme Court noted *Qualls I*, *supra*, 434 Mich 367, application of the rational basis test, as applied to the Firework Ordinance's weight limitation, is not dependent on whether plaintiff actually stores together fireworks of different classifications. Rather, the test turns on whether "any state of facts either known or which could reasonably be assumed affords support" for the purpose of the weight limitation. *Id*, 366. Therefore it was not essential for the City to demonstrate that plaintiff stores class B as well as class C explosives. Seen in the light of a state of facts "reasonably assumed" the weight limitation is still sustainable since there has been no showing that it is impossible for retail dealers to store both types together. All plaintiff has shown, at best, is that this does not occur very often.

Finally as a matter of fact the Court finds that plaintiff has not demonstrated that he never has stored different classes of fireworks together, and that in fact he has done so. On June 27, 1986, pursuant to a search warrant, class B and class C fireworks were seized from a stake truck at the back of plaintiff's place of retail sales. Those were returned to him by the order of the District Court which, in the order, identified them as class B fireworks.

For all the foregoing reasons, this Court finds that there is no reason to deviate from *Qualls I's* holding concerning the validity of the weight limitation.[12]

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[12] The Court also agrees with the City that the weight limitation also serves to facilitate the inspection of retail outlets to insure that only authorized fireworks are being stored. Obviously the more fireworks are stored in any one place the more cumbersome it is to make a detailed inspection.

In connection with the arguments concerning the constitutionality of the weight limitation, plaintiff also called into question the validity of that part of section 19-3-70(b) which pertains to the percent of stored fireworks which can be put on display for sale. Plaintiff argues that this provision, as presently enacted has no meaning and thus is invalid.

Prior to 1984 the sentence in question read "no more than twenty-five percent of the permitted storage amount in a place of retail sales shall be on display." See 1978 City Ordinance, 262-H., City Ordinance 23-7-21. However in 1984 the Fireworks Ordinance was amended by 1984 City Ordinance 314-H, and now provides "percent of the permitted storage amount in a place of retail sales shall be on display."

In *United Pentecostal Church v 59th District Judge*, 51 Mich App 323, 326 (1974), *lv den*, 391 Mich 821 (1974) the Court of Appeals reviewed the following principles:

> A penal ordinance must have an ascertainable standard of guilt. The terms of such an ordinance must be sufficiently

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Finally the Court notes that there had previously been an argument advanced by plaintiff that the 100-pound weight limitation for the transportation of fireworks was unreasonable. See section 19-3-69(c). Yet his Proposed Findings do not address this issue. in any event the reasons stated above with respect to the weight limitation for the storage of fireworks apply equally to the transportation of them. Accordingly the Court finds that there is a rational basis for the transportation weight limitation found in section 19-3-69(c), and that it is not unconstitutional.

> explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties and to guide judges and juries in the fair administration of the ordinance without resort to speculation and conjecture. (Authorities omitted).

Under the principles it is fairly obvious that this part of section 19-3-70(b) as it presently reads, is invalid. It fails to state what percent, if any, of the permitted storage amount can or must be on display. Thus it fails to provide an ascertainable standard of enforcement or guilt.

The City recognizes this but argues that this Court should infer an intent on the part of the enactors of Ordinance 314-11 to incorporate the prior standards of Ordinance 262-H. To do this, however, the Court would be required not only to define that legislative intent, but also, in essence rewrite the ordinance. Yet the courts cannot write into statutes provisions that the legislature has not seen fit to enact *Paseli v Uttely*, 286 Mich 636, 643 (1938). Moreover, it is the duty of the court to interpret a statute as it finds it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere. In other words, it is the function of the court to fairly interpret a statute as it then exists; it is not the function of the court to legislate. *Melia v Employment Security Comm'n*, 346 Mich 544, 561-562 (1986). To adopt the City's suggestion would involve the Court in a legislative function since it would require the Court to interpolate provisions in section 19-3-70(b) that have not been enacted by the City. The City's argument if adopted would therefore impermissively thrust this Court in the role of a legislator. According the Court rejects the City's argument and finds that the third sentence of section 19-3-70(b) is invalid.

Plaintiff also seeks a declaration that pursuant to MCL 750.243d he is entitled to keep a reasonable amount of goods on hand for sale to the public in a supervised display area. Apparently the reasonable amount of fireworks would not be counted toward the storage weight limitation.

MCL 750.243d imposes certain limitations on the storage of fireworks at the site of *inter alia*, a retailer. These limitations apply "except for a retailer who has goods on hand for sale to the public in a supervised display area." The remainder of Section 19-3-70(b)'s 100-pound limitation does not distinguish between fireworks that are on display for immediate sale and those that are otherwise stored. In fact, another sentence in this subsection states "Percent of the permitted storage amount in a place of retail sales shall be on display." While **this sentence is incomplete, and thus cannot be enforced as dictating that any prescribed percentage of the fireworks stored in the facility must be on display, it does indicate fairly clearly that the drafters of this subjection(sic) considered the 100-pound storage limitation to include both display and stored fireworks.** (emph. added)

When the provisions of the statute and the Fireworks Ordinance are so viewed, it becomes apparent that plaintiff's argument is akin to the preemption argument raised and rejected in *Qualls I*, and thus must be rejected now. In doing so this Court notes that the statute relied on does not mandate that any storage provisions enacted on a local level contain some exemption for display items. It is silent as to whether a municipality's ordinance storage requirements would include display and storage items. The Court therefore rejects plaintiff's argument that he has a right under the Statute to have fireworks on his premises which exceed

the 100-pound limitation.[13]

Finally, the Court acknowledges that within plaintiff's arguments is one that contends that the storage limitation, when taken in connection with the costs for complying with the various licensing requirements makes it economically impractical for him to operate his business. As to this he calculates that it would cost approximately $7,000.00 for a new retailer to comply with the licensing requirements, and that no one would do this if all they could store was 100 pounds of fireworks at a place of retail. Thus plaintiff asserts that the 100-pound limitation acts as a prohibitionary device.

This Court disagrees. Plaintiff's argument is flawed. First, as observed earlier, plaintiff himself testified that a business operating year round as opposed to seasonally could comply with the City's Fireworks Ordinance, and operate profitably. Thus that plaintiff chooses not to operate a year round facility is really the problem, not the Fireworks Ordinance. Also, it is important to point out that nothing in the federal or state statutes, at least nothing identified by plaintiff, expressly guarantees a right of a person to conduct this sort of business on a limited seasonal basis.

Also the Court notes that plaintiff's testimony is effectively rebutted by his own proffer of evidence in which, as noted earlier, a person did attempt to secure a license to sell fireworks at retail. The obvious conclusion to be drawn by this is that if it were indeed impossible to operate a retail fireworks business at a profit,

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Except, of course as provided for in section 19-3-70(b), namely, a retailer could have additionally 25 pounds of items described in Section 19-3-64(a)(1) and (a)(8). Items described in section 19-3-64(a)(2) are altogether excepted.

that person would not have sought to obtain a license.

Lastly, plaintiff's argument itself is flawed as it assumes that the 100-pound limitation will operate as a restriction on how much a retailer can sell. Any problem generated can be overcome effectively by a retailer through inventory controls and assuring himself or herself of an ongoing supply of fireworks to replenish the stock as it is sold. That this is feasible is shown by the fact that, at least until it was destroyed, plaintiff had a warehouse facility in Romulus, Michigan, from which his supplies at his retail outlet in Detroit could have been readily replaced.

For all the foregoing reasons the Court rejects plaintiff's argument that the 100-pound limitation acts as a prohibition against the retail sale of fireworks in the City.

B. Prohibition on Sale to Minors

Next the Court reviews plaintiff's challenge to section 19-3-64's prohibition of those persons who are under 18 years old from possessing, offering for sale, exposing for sale, selling at retail, using or exploding certain designated fireworks.

First plaintiff asserts that because there is no similar prohibition on either the federal regulations or state statute, this section conflicts and is then preempted by either federal regulation or state statute. In *Qualls I, supra* 364, however, the Court rejected a similar argument regarding the Firework Ordinance's weight limitation. That is, merely because a federal regulation or state statute has not addressed a subject matter does not lead to the conclusion that a local ordinance cannot regulate the subject matter. The Court finds that this section is not in conflict or otherwise preempted by federal regulation or state law.

Plaintiff also contends that the age restriction is unreasonable. Plaintiff in his *Proposed Findings, etc. supra,* 19-20 urges the Court to find that there is no rational basis to the prohibition because a) the City has not offered any evidence on this issue, b) more children are injured using such things as bicycles, baseballs, skateboards and the like than are injured from fireworks and c) the plaintiff's expert testified that in view of this "the fireworks comparison was fairly low."

By way of contrast, however, evidence also showed nationally during the fireworks season (i.e. June 23, 1991 through July 23, 1991) there were some 8,000 fireworks injuries and of these approximately 65% of those injured were under 18. Additionally plaintiff ' s expert testified that all or a great majority of class C fireworks were intended for use under close adult supervision. Finally some retail outlets, such as 7-Eleven Stores have decided to voluntarily limit sales to those over 18 in view of the risk of injury to minors.

The Court finds the age limitation rationally related to the City's legitimate interest in public health and safety, that is the health and safety of its children. Preliminarily, as demonstrated in *Qualls I,* it was not incumbent on the City to prove anything. Rather the burden was on plaintiff to show that the age limitation had no rational basis under "any state of facts either known or which could be reasonably be assumed" *Id.* 366. Plaintiff attempted to show this by adducing proof that minors under a certain age were less likely to be injured from fireworks than from other items with which children typically play. Yet the comparison is not a fair one. Those activities shown by plaintiff all involve ones in which seemingly no significant adult supervision is contemplated or needed. Whereas use of fireworks by minors does

contemplate and presumably does involve adult supervision. Thus it is telling to the Court that even with adult supervision a significant amount of injuries occur - thereby attesting to the dangerousness of fireworks. Also the comparison is not fair because significant use of fireworks is confined to a relatively short period of time. The other activities listed can be year round or nearly year round activities. For these reasons it is not remarkable for injuries to minors attributed to fireworks to-be statistically less than for other causes.

Yet this does not disprove the dangerousness. Other statistics show a large number of injuries to minors from fireworks. Other retailers have acted on the hazard that fireworks pose to minors by voluntarily restricting sales to those over 18. In the Court's view the City could legitimately believe that fireworks posed a danger to minors significant to justify the prohibition.[14]

In short the plaintiff has failed to adduce sufficient evidence to rebut the constitutionality of the age limitation found in section 19-3-64. Further, under the facts before the Court, the Court finds that the age limitation is rationally related to a legitimate purpose and is thus constitutional.

C. Labeling

Plaintiff in his *Proposed Findings, supra*, 21 also urged the Court to hold that the labeling provisions of section 19-3-64 are preempted by state statute because according to plaintiff the relevant state statute MCL 750.243a(3) does not contain such restrictions. Plaintiff's argument is that because the state statute does not contain all of the labeling requirements that are found in

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14 While plaintiff's expert may disagree with the legislative judgment of the City, this fact itself is not controlling.

section 19-3-64, those provisions in section 19-3-64 that are not found in MCL 750.243a conflict with the statute and are thus preempted. This type of argument, was, as noted earlier, rejected by the Supreme Court in *Qualls I*, and thus must be found to be without merit.

D. Restrictions On Cone and Cylinder Fountains and Smoke Devices

Plaintiff also argues that the Fireworks Ordinances through a definitional section, bars or has the effect of banning certain types of fireworks which are expressly permitted to be used by state statute. Plaintiff argues that as such the relevant provisions of the Fireworks Ordinance are preempted by state law.

The City initially responds that plaintiff has no standing to challenge the lawfulness of the definitions of the Fireworks Ordinance because he has not shown that he has or would be harmed.

In *Flast v Cohen*, 392 US 83, 99; 88 S Ct 1942; 20 LE2d 947 (1968) the Court held:

> The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues ...

To show such a personal stake, a litigant must show more than a generalized grievance shared in substantially equal measure by all or a large class of citizens. *Warth v Selden*, 422 US 490, 499 95 S Ct 2197; 45 LE2 2d 343 (1975). Also a plaintiff must assert

his own legal rights and interests and cannot base his or her claim to relief on the legal rights or interests of third parties. *Id.*

In applying these principles the Court notes that plaintiff is a retailer of fireworks and that but for the provision of the Fireworks Ordinance apparently he would be able to sell these items since they are expressly allowed to be sold under the statute. The Court finds that his interest as a potential retail vendor of these items elevates his interest from that of a mere generalized concern. Additionally as the definitional sections potentially affect what he can and cannot sell, plaintiff's claim does not solely rely on the interests of third parties. For all the reasons stated above the Court finds that plaintiff has a sufficient personal stake in these proceedings to confer on him standing to challenge the lawfulness of the definitional sections of the Fireworks Ordinance.

Turning to the merits of plaintiff's argument, the provisions of the Fireworks Ordinance at issue are those contained in section 19-3-64, (a)(6) and (7) which in pertinent part state:

> (a) Except as otherwise provided in this division, it shall be unlawful for any person to possess, offer for sale, expose for sale, sell at retail, use or explode any fireworks, with the exception that those who are eighteen (18) years of age or older may possess, offer for sale, expose for sale, sell at retail, use or explode: ...
>
> > (6) Cone fountains and cylinder fountains containing not more than two (92) grains of

pyrotechnic composition, labeled to indicate the maximum content;

(7) Smoke devices consisting of chemical compounds designed to emit smoke which cannot be hand held, rather shall be ground mounted or made to be attached to an inanimate object by a physical mounting device. (Emphasis added).

By way of contrast MCL 750.243a(2) lists a variety of fireworks possession or sale of which is forbidden unless, in connection with other sections of the statute, a permit is secured. MCL 750.243a(3) provides exceptions to the general prohibition is substituted and states:

A permit is not required for the following:

(d) Flitter sparklers in paper tubes not exceeding 1/8 inch in diameter, cone fountains, and cylinder fountains.

(e) Toy snakes not containing mercury, if packed in cardboard boxes with not more

than 12 pieces per box for retail sale and if the manufacturer's name and the quantity contained in each box are printed on the box; and toy smoke devices.

(Emphasis added).

Much is made by the City of the legislature history of the 1978 amendments to MCL 750.243a in 1978 PA 258. That amendment did two things. First, it removed the basis for concluding that more liberal federal regulations could be relied on by a person seeking to use types of fireworks not permitted by the Michigan statute and this legislature. This had the effect of legislatively overruling *North Central Distributing v Lansing*, unpublished decision of the United States District Court for the Western District of Michigan, June 19, 1977 (Docket No. G77-314), see plaintiff's Exhibit 9.[15]

Second, and more pertinent to our inquiry, under the 1978 amendment as recognized in the City's *Findings of Fact, etc.*, pp 6-7, "the Fireworks Act was made more permissive than

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15 *North Central* held, under the extant version of MCL 750.243a, a City could not prohibit the use of fireworks. The implication of *North Central* was actually somewhat broader since apparently under the construction of MCL 750.243a in connection with the State's Hazardous Substances Act, appropriately labeled fireworks were outside of the otherwise prohibitory provisions of the former statute, since MCL 750.243a made its provisions applicable "except as otherwise provided, by law." Significantly, even in *North Central* the Court recognized the power of local communities to regulate fireworks usage and sale. *Id.* slip op at 6-8.

it had been prior to 1976, for PA 258 added the words 'cone fountains and cylinder fountains' to the fireworks expressly exempted from the prohibitions of the Act." Also PA 258 inserted the words "toy smoke devices" in subsection e. The Court agrees with the City's construction of these amendments that there was a legislative intent to liberalize the exemptions by expanding what sort of devices would be allowed in Michigan.

In *Qualls I, supra*, 434 Mich 362, n 4 our Supreme Court noted that a municipality cannot pass ordinances that contravene state law, i.e., prohibit that which is permitted by the state ... and that the enactment of an ordinance which directly conflicts with state law ... is prohibited" (authorities omitted). In *Qualls II*, supra 7-8, the Court of Appeals further noted that a municipality could not prohibit under the guise of regulation that which was permitted by state statute.

The City appears to argue that notwithstanding State law it may regulate to the point of prohibition the sale and use of specific types of fireworks within the City. Reliance is placed on *Cohen v Bredehoeft*, 290 F Supp 1001 (SD Tex 1968), *aff'd*, 402 F2d 61 (CA 5 1968), *cert den*, 39 3 US 1086 (1969). In *Bredehoeft*, the Court sustained the validity of an ordinance adopted by the City of Houston, Texas in which Houston altogether banned the possession and sale of fireworks within the City notwithstanding a state statute under which the possession of some types of fireworks were permissible. Yet the state statute expressly provided that nothing in it shall be construed to limit or restrict the power of cities ... not to enact ordinances prohibiting or imposing further regulations on fireworks..." *Id*, 1006, N 4. There is no comparable provision in the Michigan statute. *Cohen* therefore cannot support an agreement that the City, under its police powers, may entirely eliminate the possession or sale of fireworks within the City.

Hitherto, this Court, under *Qualls I, supra*, 364

has rejected plaintiff's preemption arguments previously because they have been based on the mistaken notion that the failure of the legislature to prohibit an activity was tantamount to an implied permission. The situation presented by section 19-3-64(a)(6), (7), in view of MCL 750.243a(3)(d), (e), is different since under the statute the state has expressly given its consent for the retail sale of these items. The City's Fireworks Ordinance does allow cone and cylinder fountains and smoke devices to be possessed or sold. Therefore there is no question that this section does not directly conflict with the state statute. The real question posed by plaintiff's inquiry is whether the added conditions stated in the City's Fireworks Ordinance constitute a regulation of these items which amounts to a prohibition.

Relative to the cone and cylinder fountains, plaintiff's expert, Dr. John Conkling, testified that cone and cylinder fountains which contain no more than two grams of pyrotechnic composition are not, or indeed had ever been manufactured. Conkling dep, pp 27-28, plaintiff's Exhibit 1. Dr. Conkling also opined that it would not be technologically feasible to so manufacture a fountain cylinder. *Id*, 29. Finally he opined that enforcement of the restrictions to cone and cylinder fountains would effectively prohibit them. *Id*. The foregoing testimony appears unrebutted.

Under the foregoing uncontradicted evidence the Court does find that that part of section 19-3-64(a)(6) which purports to limit cone and cylinder fountains to devices containing "not more than two (2) grams of pyrotechnic composition" does in fact serve to prohibit such devices since no such devices can be manufactured. Yet the state statute expressly allows for their possession and sale. Under the principles of *Qualls I* and *Qualls II* this Court finds that this provision (i.e. the above quoted portion of section 19-3-64(a)(6)) is invalid as conflicting with

state law.

As to smoke devices, the pertinent provision of the Fireworks Ordinance decrees that only those which "cannot be hand held" are allowable. As to this Dr. Conkling testified that the current smoke devices on the market are reasonably small devices, with a weight of an ounce or less. The labels on them indicate that they are not to be held in the hand. Conkling dep. 36. Dr. Conkling also testified that while it is theoretically possible to make such a device, as a practical matter it would be impossible because it would require making such devices with so much weight as to be physically impossible to hold by hand. *Id.* He also testified that no such devices had ever been manufactured. *Id.* 36-37. Finally he opined that the restrictions' effect amounts to a prohibition of smoke devices. *Id.* 38. Again the City offered no testimony to rebut this testimony.

The Court finds that under the principles of *Qualls I* and *Qualls II*, that part of section 19-3-64(a)(7) which requires that any smoke devices "which cannot be hand held" amounts to a total prohibition of smoke devices because it is impractical to make such devices. These are, however, expressly allowed under MCL 750.243a(3)(e). Therefore that part of section 19-3-64(7) immediately quoted above is invalid as conflicting with state law.[16]

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[16] It should be noted, and the Court so holds, that the parts of section 19-3-64 which were found to be invalid are severable from this section. Their removal does not render the remaining parts of this section or indeed the Fireworks Ordinance as a whole, meaningless. Thus the remaining parts of this section and the Fireworks Ordinance are not invalid due to the limited holding regarding parts of section 19-3-64(a)(6)(7).

E. Construction of Michigan Fireworks Statute. MCL 750.243a(2), (3)

In the course of these proceedings the plaintiff requested the Court to interpret the Michigan Fireworks Act (the Act), MCL 750.243a, *et seq*, as permitting the unrestricted sale to consumers of items such as helicopter rockets, missiles and shells, ground spinners, wheels, illuminating torches and new or novelty fireworks not mentioned in the Act. Plaintiff bases his request on prior orders of this Court's predecessor, Judge John Hausner and on a textual reading of the statute. See plaintiff's Supplemental Proposed Findings, etc.

At issue are the following provisions of MCL 750.243a(2), (c), (d):

> (2) Except as provided in subsections (3) and (4) of this section and sections 243b, 243c, and 243d, a person, firm, copartnership, or corporation shall not offer for sale, expose for sale, sell at retail, keep with intent to sell at retail, possess, give, furnish, transport, use, explode or cause to explode any of the following:
>
> (c) Firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, bottle

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Finally because of the above result there is no need to determine whether such provisions would be constitutional under the rational basis test.

rockets, whistling chasers, rockets on sticks, or other fireworks of like construction.

(d) Fireworks containing an explosive or inflammable compound or a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chlorates, oxalates, sulphides of lead, barium, antimony, arsenic, mercury, nitroglycerine, phosphorus, or a compound containing these or other modern explosives.

(Emphasis added).

In review of the argument posed, section 243a provides an itemized list of fireworks that are excepted from subsection 2's prohibition.[17]

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[17] For example MCL 750.243aA(3) states in pertinent part:

(3) Exceptions. A permit is not required for the following:

(a) Flat paper caps containing more than .25 of a grain of explosive content per cap, in packages labeled to indicate the maximum explosive content per cap.

(b) Toy pistols, toy cannons, toy canes, toy trick noise makers, and toy guns of a type approved by the director of the department of state police in which paper caps as described in subdivision (a) are used and which are so constructed that the hand cannot come in contact with the cap when in place for the explosion and which are not designed to break apart or be separated so as to form a missile by the explosion.

The list is fairly specific. While the Act does not provide for definitions of the various items found therein, the definitions accorded those terms found in the rules adopted under the federal Hazardous Materials Transportation Act, or definitions given them by trade associations such as the American Pyrotechnics Association have been utilized to provide meaningful definitions for them. See OAG 1979-1980, No. 5488, p 155, 156-157 (May 3, 1979).

In construing the relationship between subsection 2 and subsection 3, it is apparent from the express language of the statute itself that subsection 3 acts as an exception to the prohibitory provision of subsection 2. As noted generally in 2A Sutherland, Statutory Construction (5th ed, Single Rev), p 165:

> Exceptions like provisos, operate to restrict the general applicability of legislative language .... Where there is an express exception, it comprises the only limitation on the operation of the statute

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(c) Sparklers containing more than .0125 pounds$ of burning portion per sparkler.

(d) Flitter sparklers in paper tubs not exceeding 1/8 inch in diameter, cone fountains, and cylinder fountains.

(e) Toy snakes not containing mercury, if packed in cardboard boxes with not more than 12 pieces per box for retail sale and if the manufacturer's name and the quantity contained in each box are printed on the box; and toy smoke devices.

> and no other exceptions will be implied. An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated. Thus, where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exception. One who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception.

In the case at bar, plaintiff's argument, and evidently the basis for Judge Hausner ' s ruling, was based on the belief that the general clause found at the end of subsection 2(c) was unenforceable. Evidently under plaintiff's argument the prohibition in subsection 2(c) is of limited effect to only those items specifically listed because of the penal nature of the statute. In other words under plaintiff's interpretation the last phase is unenforceable because it is inadequate or vague.

There are some problems with this approach. First it ignores the fact that the provisions of subsection 2 appear to state a general rule of prohibition with limited exceptions expressly stated. Plaintiff's interpretation, however, stands this statutory scheme on its head, and elevates the exemptions found in subsection 3 as a general rule of permission with limited exceptions found in subsection 2. Moreover, this argument for interpretation of the Act ignores the cannon of statutory construction under which effect must be given, if possible to all the language of a statute. See generally, 22 Michigan Civil Jurisprudence, Statutes, § 120, p 486. Also by arguing that the clause is too indefinite, it ignores another rule of statutory construction under which a court must construe the provisions of a

statute together as a whole. *Id.* By construing all of section 2(c) together, the general phrase at the end of the subsection is not ambiguous, and can be given meaning through application of the rule of statutory construction *ejusdem generis*, that "where a statute uses a word or term of general significance preceded by several words particular in :their meaning, the general word or term is limited to things of like kind." *Id*, 493. The fact that this is a criminal statute does not render the rule of *ejusdem generis* inapplicable. Indeed as noted in 2A Sutherland, supra, 202, N 1, the rule of *ejusdem generis* is particularly applicable to criminal statutes. The Court therefore finds that the phrase "other fireworks of like construction" is not too indefinite, but rather is a phrase of general application qualified by the itemization of fireworks which preceded it.

Plaintiff additionally argued that the items at issue were not within the proscribed list and therefore not prohibited. As to this, setting aside for the moment whether these items were " fireworks of like construction" when compared with those listed in subsection 2(c); the proscription of fireworks containing explosive or inflammable compounds stated subsection 2{d) would appear to apply. Plaintiff's argument here is that the City has failed to adduce any evidence that these items contain any of the chemicals specifically listed in subsection 2(d). Yet this was unnecessary since that subsection also contains a generic clause "or other modern explosives" which would include explosive chemicals not listed in the subsection. In any event, it would seem that since plaintiff sought affirmative relief on this matter, it was he that had the burden to show that these items did not fall within the terms of subsection 2 or that the exceptions found in subsection 3 applied.

For all the foregoing reasons the Court construes MCL 750.243a to be a general proscription against fireworks. Therefore

unless it can be shown that fireworks not mentioned as an exception are subject of the prohibitory provision of subsection 2. The Court therefore will decline to adopt the findings of facts and conclusions of law urged to be adapted in plaintiff's *Supplemental Proposed Findings, etc.* To the extent that any prior orders entered conflict with this ruling, they are to be vacated.[18]

5. Conclusion

In summary of the foregoing the Court finds that the provisions of section 19-3-64(a)(6), (7) which restricts cone and cylinder fountains to those which do not contain more than 2 grains of pyrotechnic composition and restricts smoke devices to only those that can be hand held, as well as, the third sentence of section 19-3-70(b), are invalid, and plaintiff's request for declaratory relief to that effect will be granted. In all other respects the various requests for declaratory relief sought in plaintiff's *Proposed Findings and Supplemental Proposed Findings*, will be denied. Also plaintiff's motion for reconsideration of the May 1, 1992 Order will be denied. The City may submit an order conforming to this Opinion.

The fact that such rulings may have been made by this Court's predecessor is not determinative. Judge Hausner's rulings are not binding. See MCR 2.613(B). Moreover in *Qualls II*, the Court of Appeals directed that the trial court revisit its rulings in the case. Therefore it is not unseemingly that this Court may have reached a somewhat different conclusion on the issue. Finally this ruling is without prejudice to plaintiff attempting to show that the items at issue are functionally the same as those found in subsection 3 or are otherwise not fireworks within the meaning of subsection 2.

DATED: APR 28 1993
/s/
LOUIS F. SIMMONS, JR.
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, et al,

Plaintiffs,

V

THE CITY OF DETROIT, et al

Defendants,

Wayne County Circuit
Court No. 85 515 546 CZ
(ON REMAND)

Honorable
Louis F. Simmons, Jr.
(P-20491)

_____/

DAVID L. ROSE (Pro Hac Vice)
HARNETHA JARRETT (P-31419)
Attorneys for the Defendant
_____/

HUGH M. DAVIS (P-12555)
Attorney for Plaintiffs
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER OF MAY 1, 1992, AND ORDER GRANTING IN PART AND DENYING IN PART REQUESTS FOR DECLARATORY JUDGMENT PHASE I TRIAL

At a session of this Court held in the City-County Building,
City of Detroit, County of Wayne,
Michigan on: (stamped) **May 17, 1993**
PRESENT: (stamped) **Louis F. Simmons, Jr.**
Circuit Court Judge

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This matter having come before the Court on Plaintiffs' motion for reconsideration of the Order of May 1, 1992, and for trial of that portion of this case in which Plaintiffs seek a declaratory judgment that various provisions of the Detroit Fireworks Ordinance, Section 19-3-62 et seq, are preempted or in conflict with state or federal law, or are unconstitutional; that the Michigan Fireworks Act, MCL 750.243a et seq, permits the unrestricted possession and sale to consumers of mines, shells, helicopter type rockets and spinners and other fireworks not expressly listed in the Act; and that the license fee for retail fireworks dealers set by the Director of Consumer Affairs pursuant to the Fireworks Ordinance, Section 19-3-67(d), and the Licensing Ordinance of the City Code, Section 30-1-18(a), is unreasonable and unconstitutional; and, the Court having heard the testimony of the witnesses and reviewed the exhibits, and having received the proposed findings of fact and conclusions of law, and other materials from counsel, and having heard arguments of counsel; and the Court being otherwise fully advised in the premises; and the Court having rendered an Opinion on April 28, 1993, in this matter setting forth the reasoning and findings and conclusions of the Court;

It is hereby ORDERED that:

A. The Court denies the Plaintiffs' motion for reconsideration of the May 1, 1992 Order holding that the licensing provisions of the 1984 Detroit City Code, Section 30-1-1 et seq, the Licensing Code, do contain constitutionally adequate standards, and the challenged procedure for handling license applications and renewals is declared to be valid and constitutional, for the reasons set forth in the Opinion of April 28, 1993, pp 8-13.

B. The Court declares that Section 19-3-64(a)(6) and (7) of the Fireworks Ordinance of the 1984 Detroit City Code, prohibiting the possession and sale of cone fountains and cylinder fountains containing more than two grains of pyrotechnic composition, and

smoke devices which cannot be hand held, are in conflict with the provisions of the Michigan Fireworks Act, MCL 750.243a(3)(d) and (e), and are therefore declared to be invalid, for the reasons set forth in the Opinion of April 28, 1993; and that the part of Section 19-3-70(b), which states "percent of the permitted storage amount in a place of retail sales shall be on display" has no meaning and is thus invalid, for the reasons stated in the Opinion of April 28, 1993, pp 27-29.

C. The claims of the Plaintiffs for the declaratory judgment, except as stated above in Paragraph B., are denied; and the challenged provisions of the 1984 Detroit City Code set forth below are declared to be valid and constitutional, for the reasons set forth in the Opinion of April-28, 1993, pp 14-27;

1) Section 19-3-67, the licensing provisions, including the requirements for insurance and payment of a license fee, are valid and constitutional;

2) The licensing fee mandated by Section 19-3-67(d) and set pursuant to the Licensing Ordinance, Section 30-1-18(a), is not unreasonable or confiscatory, and is valid and constitutional;

3) Section 19-3-68, the record keeping provision, is valid and constitutional;

4) Section 19-3-70(b) which limits the amount of fireworks which may be stored or otherwise kept in a retail establishment to a maximum of one hundred (100) pounds gross weight, not including the additional twenty-five {25) pounds of items described in Section 19-3-64(a)(1) and (a)(8) and the items described in section 19-3-64(a)(2), is valid and constitutional; and the provision which requires storage of fireworks in an indoor magazine is valid and constitutional; and the one hundred (100) pound maximum gross weight limit of Section 19-3-70(b) includes both display and stored fireworks;

5) Section 19-3-69(c), which limits unpermitted transportation of fireworks up to one hundred (100) pounds, is valid and constitutional;

6) The provisions of Section 19-3-64, prohibiting the sale of

fireworks to minors, and prescribing labeling requirements are valid and constitutional;

7) Except for the provisions of Section 19-3-64(a)(6) and (7), the provisions of Section 19-3-64(a) are valid and constitutional;

D. The request of the Plaintiffs that the Court interpret the Michigan Fireworks Act, MCL 750.243a(2)(c) and (d), to permit the unrestricted sale to consumers of items such as helicopter rockets, missiles and shells, ground spinners, wheels, illuminating torches and new and novelty fireworks not mentioned in the Act is denied; and those provisions are declared to restrict the possession and sale of all fireworks which are not specifically listed in the exceptions contained in MCL 750.243a(3), for the reasons set forth in the Opinion of April 28, 1993, pp 43-48.

E. The injunctions or other orders of this Court, entered in July, 1985, June and July, 1986, and December, 1988, and any other orders entered prior to May 1, 1992, which may be inconsistent with the provisions of this Order are hereby vacated, and shall have no further force or effect.

HON. LOUIS F. SIMMONS, JR.
CIRCUIT COURT JUDGE

/s/ Deputy Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, et al,

Plaintiffs,

-V-

Case No. 85-515546-CZ
Honorable Louis
F.Simmons, Jr. (P-20491)

THE CITY OF DETROIT, et al,

Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION WITH RESPECT TO THEIR LIABILITY UNDER 42 USC § 1983 AND STATE TORT LAW

OPINION

1. Introduction

This case is an action for, *inter alia*, damages, which is brought by the plaintiff Glen Qualls and his wife, Leticia Qualls, as well as two of his employees Paul Brusse and Berta Perez. The defendants are the City of Detroit and seventy-two individuals who are, or were during the relevant time periods, employees of the City. The case arises out of a seemingly interminable legal battle between the City and Qualls over the sale of fireworks at retail within the City.

The instant case began as one for declaratory relief.[1] The complaint was later amended to include claims for money damages arising out of the denial by the City of a retail license to sell fireworks in 1985, see Amended Complaint, paragraphs 90-92, 95-98; and various enforcement activities by the individual defendants which occurred in 1984, *Id,* paragraphs 99-162; and in 1986 *Id,*,paragraphs 166-190.

Plaintiffs assert that defendants' action constituted a violation of 42 USC § 1983 and various intentional torts. *Id,* paragraphs 197-198.

The case is presently before the Court primarily on defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(10)[2] with respect to plaintiffs' claims premised on § 1983 and intentional tort claims. Also defendants seek renewal of earlier summary disposition motion as to any liability based on the 1985 denial of a fireworks license.[3]

1

This portion of the action was resolved in the Court's Opinion dated April 28, 1993.

2

The well known standards for determining such motions were summarized in *Dzierwa v. Michigan Oil*, 152 Mich. App.281,284 (1986.)

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At the outset the Court notes that the Amended Complaint listed some 70 individuals and that numerous individual defendants were previously dismissed. As this Court understands the status of the case only the following 47 individuals are at issue, either through prior denials of summary disposition or through Plaintiff's request

The underlying theory of the case, its legal history, the impact of various Supreme Court and Court of Appeals decisions[4] relative to the request for declaratory relief, as well as the resolution of those requests, have been treated by this Court at some length in its prior Opinion, dated April 23, 1993 (hereinafter the 1993 Opinion), and need not be repeated here except where necessary.

It should be pointed out that this Court's predecessor, the

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that this court revisit prior dismissals of certain defendants:

Ameer Aazaud, Rayo Baker, James Bannon, Frederick Burkheiser, Robert Butucel, Ralph Daniels, William Dunn, Michael Habib, William Hart, Steven Hines, Robert Haynes,Arnold Joseph, P.O. Keller, Danny Kemp, Thomas Koval, Raymond Kunick, Richard Lang, Philip Lipscombe, Gregory Love, Mijahid Malik, Michael McCartha, Thomas McFarlane,Robert Michalik,Hilda Montleon, Bernhard Mueller, Odell Parker,Thomas Peterson, Charles Pritchett,Thomas Raymus,James Roby,P.O. Donald Robinson, Fire Marshall Donald Robinson, John Sanders, John Savinsky, Ester (sic) Shapiro, Donald Smith, William Sneed, Kenneth Tye, Harold Upshaw, David Vann, Frank Ward,Charlie Whitfield, Robert Williams, Roger Wilson, Joseph Youngblood,Joseph Zana.

Additionally the City's liability under section 1983 is still at issue.

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These decisions are *Detroit v. Qualls*, 434 Mich. 340 (1990, hereafter *Qualls I*) and *Qualls v. Detroit*, unpublished opinion per curiam of the Court of Appeals decided March 6, 1991 (Docket Nos. 93518,115434,118836,118837,118908) lv den. 437 Mich. 1017 (1991, hereafter *Qualls II*.)

Honorable John H. Hausner, had previously granted defendants' motion for summary disposition with respect to any claims arising out of the denial of Qualls' application for a license in 1985. Judge Hausner, however, granted plaintiffs' motion for reconsideration on that issue. Defendants presently again move for summary disposition as to any claim based on the denial of the 1985 license, and it is to this portion of the plaintiffs' claims that the Court initially turns its attention.

2. No Liability For Failing To
Issue License in 1985.

In 1984 Qualls had obtained a fireworks retail sales license. The duration of the license was from March 1, 1984 through February 28, 1985. According to the Amended Complaint on March 15, 1985 he presented himself at the City's licensing bureau to obtain a renewal of his license. He was refused by defendant Joseph due to the presence in his file of a note by Esther Shapiro, the head of the City's Consumer Affairs Department (CAD) which stated "Do Not Renew" and was dated December 16, 1984. *Id.*, para 90. Thereafter on April 16, 1985, Qualls sent Shapiro a letter requesting that his license be renewed. *Id*, para 91. On April 22, 1985 Shapiro responded by a letter in which she denied his request because, *inter alia*, he had stored more than 100 pounds of fireworks on his premises. Quails did not seek an administrative hearing to challenge her decision.

Previously this Court held that the provisions of the City's licensing ordinance satisfied the procedural requirements of due process noting that under section 30-1-17(a) an applicant for a new license who was denied a license could request a hearing before the head of the CAD to contest the denial and under section 30-1-17(b), (d) before the City suspended or revoked an existing license the CAD must notify the licensee of its intent to suspend or revoke, and to set up a show cause hearing whereby the licensee could contest the

proposed suspension or revocation. Pursuant to section 31-1-4(A)(i) a license could be denied or revoked upon proof of the violation of, *inter alia,* any City ordinance.

Defendants argue that any due process claim that Qualls may have which arises out of Shapiro's denial of Qualls' license in 1985 must fail because, *inter alia,* Qualls has not shown he had a cognizable property interest in the renewal of his license and that, in any event, he has not shown that, absent the alleged denial of due process, he would have been entitled to the license. The Court agrees that either of these arguments supports the dismissal of any due process claims based on the 1985 denial of Qualls' license. The Court addresses the former argument first.

As summarized in *Bradfield v Blisma,* 675 Supp 382, 387 (WD Mich,1987):

> To state a cause of action for denial of property without due process of law, plaintiff must allege that he has a property interest protected by the Fourteenth Amendment. The Constitution does not create property interests. They must arise from some independent source such as state law .... To have a property interest in a benefit conferred by state law, such as the right to undertake a licensed activity, an individual must have more than an abstract need or desire for it. A unilateral expectation is not enough. The individual must have a legitimate claim of entitlement to the benefit. (Authorities omitted).

Plaintiffs argue that Qualls' property interest existed by virtue of the fact that he had already been granted a license in 1984, and thus he had an existing property interest in preserving his existing license, notwithstanding that it had already expired by the time he

applied for its renewal. Reliance is placed on language found in *Detroit v Mashlakian*, 15 Mich App 236, 239-240 (1968) which suggests that the holder of a license which is to be renewed periodically has a property right in its continuance which cannot be defeated unless due process protections are provided. On point with the instant case, *Mashlakian* expressly refused to draw a distinction between a "renewal or a new application." *Id*, 239.

In *Mashlakjian*, however, the licensee did timely apply for the renewal of his license. This fact makes much of *Mashlakjian's* discussion dicta, since it was not necessary for the Court to determine what property rights a licensee had in the renewal of an expired license. *Mashlakjian* thus does not govern this case, since Qualls did not timely apply for the renewal of his license.

In *Eastwood Amusement Co v Mayor of East Detroit*, 325 Mich 60, 74 (1949) the Court had the occasion to discussing the effect of an expiration of a license, quoting with approval, *State, ex rel Interstate Air Parts, Inc v Minneapolis- St Paul Metro Airports Comm'n*, 223 Minn 175, 187; 25 NW2d 718, 726 (1947):

> "A license confers upon the licensee the right to engage in the licensed business only for the term specified in the license. A prior expired license is *functus officio* and confers no rights upon the licensee named therein, except in certain cases where by statute it entitled him to a renewal upon compliance with specified conditions. Realtors do not claim to have such statutory license renewal rights. They are applying for new licenses. In such cases, their application for a license stands upon the same basis as if they never had been licensed."
>
> (Authorities omitted).

Because Qualls' license expired without his seeking its renewal, his right to a license was equivalent in law to that of a first

time applicant. First time applicants, for licenses, however, have been held not to have a property right protected by the guarantees for procedural due process. *Bradfield, supra,* 387 -388 (and cases stated therein); also see *Bisco's Inc v Liquor Control Comm'n,* 395 Mich 706, 718 N 15 (1976).[5]

In the case at bar, because Qualls failed to seek renewal of his license before it expired, his status became that of a first time applicant. Therefore he no longer had a property interest in its renewal. Without such an interest, any due process claim based on its denial of the application must fail.

At this point, the Court notes and rejects plaintiffs' reliance on the so-called automatic renewal provisions of the ordinance. This provision would have become operative, if at all, only upon a timely application for a license renewal. This, Quails failed to do. Also plaintiffs contended that an apparent policy of CAD to send renewal applications to existing licensees could give rise to a protected property interest. This argument fails for several reasons. First this policy is not embodied in any formal statement of policy, regulation or ordinance. Rather it appears to be a general practice of CAD. Plaintiffs cite no authority, nor is the Court aware of any, that contemplates property rights being created out of a generalized informal practice. Second the policy itself related to how the CAD will handle license renewals or in other words, the process utilized by CAD. Yet the existence of reasonable procedures alone do not give rise to a substantive property or liability interest protected by due process. *Yale Auto Parts, supra,* 58; *Olen v Wakinebona,* 461 US 238,

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Bisco's Inc, supra, expressly warned against according first time applicants the same rights as existing licensees. *Bisco's Inc* thus provides additional support for not following that portion of *Mashiakjian* relied on by plaintiffs.

250, N 12; 103 S Ct 1741; 75 LEd2d 813 (1983). Finally there is no testimony by Qualls that he knew of this policy or relied on it.

Beyond the issue of whether Qualls had a property interest in the renewal of his license, in order to prevail on his claim that the denial of his application was violative of his due process rights, Qualls must also show that had sufficient due process protections been accorded him he would have been entitled to receive his license. As summarized in *Bradfield, supra,* 388:

> Generally an applicant for a license will only be held to have a legitimate, Fourteenth Amndment claim of entitlement to the issuance of that license on a finding that, absent the alleged denial of process, there is a certainty or very strong likelihood, that the permit or license would have been granted. *Yale Auto Parts, Inc. v. Johnson,* 758 F2d 54, 58-59, (2 Cir. 1985.)

Also see *Brady v Town of Colechester,* 863 F2d 205, 213 (CA 1, 1988).

In the case at bar one reason given by Shapiro for denial was that Qualls had stored more than 100 pounds of fireworks on his premises. Under section 19-3-70(b), a retailer could not store fireworks in excess of 100 pounds, in gross weight. There has been much litigation over the constitutionality or otherwise validity of this provision. **Indeed when Shapiro had issued her denial letter the City had already received conflicting judicial pronouncements.** (emph. added) Nevertheless in *Qualls* I, the validity of the weight limitation was sustained. Plaintiffs' arguments for revisiting this holding were rejected in the Court's 1993 Opinion, pp 25-27. Thus a violation of section 19-3-70(b) would provide sufficient grounds for denial of the license.

Qualls argues that **Shapiro's testimony indicates that she gained her knowledge through second-hand sources** and thus had no personal knowledge **of Qualls' alleged violation of the ordinance**. (emph. added) Yet the ordinance does not require that the

director of CAD have such knowledge. In any event, Qualls had admitted in testimony at various times in these proceedings that he stored between 300 to 400 pounds of fireworks on the premises. This admission leads to the conclusion that ultimately there would have been proof of an ordinance violation. Thus Shapiro's denial was justified, It follows that Qualls cannot show that he would have had a significant likelihood that his license application would have been granted. It follows that any due process claims based on the 1985 denial of his license cannot prevail, and defendants are entitled to summary disposition with respect to any liability based on it.[6]

III. Miscellaneous Claims

The Court next turns to the remaining bases of liability under section 1983. Preliminarily the Court notes that in *Qualls* II, slip op 12 - 13, **the Court of Appeals found that the complaint adequately stated a claim against the City under section 1983 on the basis** of the allegations of paragraph 93 (g) of the Amended Complaint. Yet the allegation in that paragraph refers to the **1985 refusal and denial to issue** to Plaintiff (Qualls) his Class "C" Common Fireworks **retailer's license**. (Emph. Added) As found above, the denial of the 1985 license cannot support a claim of liability as a violation of Qualls' due process rights. This Court's resolution of that issue would

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[6] Specifically, the Court notes that the only basis for imposing liabilityon Defendant Joseph arises out of Quall's application to obtain a license in 1985. See Amended Complaint, para.90,97. Hence the Courts holding removes this sole basis and summary disposition as to him is appropriate. Also summary disposition with respect to Shapiro is appropriate as to those allegations in the complaint which relate to involvement with respect to the denial of the 1985 license. See Amended Complaint, para. 90-92, 95-98.

also effectively appear to defeat any claim in paragraph 93(g). Thus while in the abstract, paragraph 93(g) may have stated a claim upon which relief could be granted, under the undisputed material facts of this case, recovery is not warranted under this paragraph.

Nevertheless, plaintiffs correctly note that, beyond the question of whether Qualls' due process rights have been violated, they have also alleged that the various identified defendants as agents of the city violated substantive constitutional protections, chief amongst which are plaintiffs' rights under US Const Am IV, see for example Amended Complaint, para 93(E). At this point it matters little, as argued by defendants, that discovery has produced no officially adopted and promulgated policy. As noted in *Qualls* II, *supra* 13:

> The complaint specifically alleges a persistent practice by the City's officials or employees directed toward plaintiffs which even if not authorized by officially adopted and promulgated policy is sufficiently common and well settled that it might constitute a custom that fairly represents City policy. On the face of the complaint, actual or constructive knowledge of the custom or policy is attributable to the City or its highest officials. This condoned "custom or usage" is an alternative basis to the official policy requirement for municipal liability under 42 USC 1983.

Thus, even in light of this Court's resolution of plaintiff's due process claims arising out of the 1985 license denial, the Court would still find that the complaint states a claim under section 1983 against the City and thus under MCR 2.116(C)(8) summary disposition would not be warranted. Yet when the viability of these surviving claims based on substantive constitutional protections are examined through a motion brought under subrule C-10, a different

result might obtain, and indeed the Court of Appeals in *Qualls* II, supra 13, expressly directed a review of these claims in light of a motion brought under sub-rule C-10.

Defendants' original motion for summary disposition with respect to the section 1983 claims against the individual defendants primarily asserted qualified individual immunity. As explained in *Guider v Smith*, 431 Mich 559, 565, 568 (1988):

> The proper test regarding claims of qualified or 'good faith' immunity under 42 USC 1983 actions can be found in *Harlow v Fitzgerald*, 457 US 800; 102 S Ct 1717; 73 LE2d 39E (1982) ... The Court held that a government official performing discretionary functions is entitled to immunity damages "insofar as [his or her] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow, supra*, p 818."
>
> Thus, in addressing the qualified immunity question as redefined in *Harlow*, trial courts must consider: 1) whether the alleged conduct establishes a constitutional violation, and 2) whether the constitutional standard was clearly established at the time in question. *Id*, p 818. If the undisputed facts show that the defendant's conduct violated no clearly established constitutional standards, qualified immunity applies as a matter of law. However, if the law was clearly established, the immunity defense ordinarily would fail unless the official demonstrates extraordinary circumstances, and can prove he neither knew nor should have known the relevant legal standard, in which case the defense should be sustained, p 819.

In *Anderson v Creighton*, 483 US 635,639 - 641; 107 S Ct 3034; 97 LE2d 523 (1987) the Court held that merely pleading that a constitutional right, clearly recognized in the abstract, had been violated was insufficient. Rather

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant,sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

The purpose of qualified immunity as defined under *Harlow* is allowing unsubstantial claims against government officials to be resolved prior to discovery and on summary judgment if possible. *Harlow, supra*, 47 US 818-819; *Anderson, supra*, 483 US 640, n 2. Ordinarily resolution of the issue of qualified immunity is to be determined as a matter of law by the trial court. *Dominique v Telb*, 831 F2d 673, 677 (CA 6, 1987).

Thus this Court will proceed to examine whether the alleged acts of the remaining individual defendants could be deemed to establish a constitutional violation, and if so whether the constitutional standard was clearly established at the time in question. In plaintiffs' "Proposals and Response to Defendants' Submissions of Proposed Findings of Fact " filed June 23, 1983, p 57, Plaintiffs enumerate seven instances of clearly established constitutional rights actionable under section 1983. Unfortunately the task of analysis is made harder due to plaintiff's failure not only here, but also in the Amended Complaint, to connect any of these examples with any specific defendant or conduct. Nevertheless the above noted enumeration does serve to identify which so-called rights are at issue. These alleged rights are:

1. Freedom from systematic police harassment
2. Property rights
3. Illegal arrest
4. Warrantless search
5. Unreasonable searches and seizures
6. Unreasonable manner of search even with warrant
7. Malicious prosecution

Before commencing with what must be a somewhat specific and lengthy review, the claims against the individual defendants, it is useful to review whether any of these seven alleged rights can support granting relief to plaintiffs under section 1983.

The third through sixth of the enumerated "rights" clearly invoke the protections of US Const Amend IV. Also malicious prosecution has been held under limited circumstances to involve a deprivation of liberty protected by U S Amend XIV. See *Dunn v Tennessee*, 697 F2d 121 (Ct 6 1982), *cert den*, 460 US 1086; 103 S Ct 1778; 76 LE2d 349 (1983).

Yet plaintiffs' claims under "systematic police harassment" and "property rights" are problematic. With respect to any claim based on "systematic police harassment," plaintiffs rely on *Singer v Wadman*, 595 F Supp 188 (D Utah, 1992), aff'd, 745 F2d 606 (CA 10, 1984); *certden*, 470 US 1028' 105 S Ct 1396; 84 LEd2 785 (1985). In *Singer, supra*, 284-285, the Court noted that the cases in which a section 1983 claim has been successfully premised on allegations of systematic police harassment were those where the conduct alleged to be systematic harassment also involved an alleged deprivation of a specific constitutional right. The Court concluded that, standing alone, systematic harassment did not constitute a valid claim under section 1983. In the case at bar, therefore, a theory of recovery based on systematic police harassment alone could not support plaintiffs' claims. Plaintiffs' description of defendants' acts as systematic police

harassment thus adds nothing to support their claims.

As to plaintiffs' invocation of "property rights," while it is apparent that property rights are protected by the Fourteenth Amendment, nevertheless, it is entirely unclear whether, **beyond the licensing issue**, and **plaintiffs' interest in keeping property free from unlawful searches and seizures under the Fourth Amendment**, any other so-called property rights are at issue. (Emph. Added) Plaintiffs' citations to two cases in support of their claim of property protection does not aid or clarify their claim for relief. One case cited *Meyers v City of Alcoa*, 752 F2d 196 (CA 6 1985) involved an alleged property right in the receipt of electricity. The other case cited was *Willis v Lascoris*, 499 F Supp 7459 (ND NY 1980), a case involving an alleged property right to food stamps. Neither involved facts or circumstances which appear relevant to a determination of this case. The Court therefore finds, in view of its disposal of plaintiffs' due process claim involving the 1985 license denial, that plaintiffs' invocation of "property rights" protected by the Fourteenth Amendment not to support granting relief in this case insofar as it relates to the licensing issue.

Finally the Court notes that **plaintiffs apparently rely generally on Judge Hausner's previous findings that some of the defendants engaged in conduct that constituted a contempt of court since he found such conduct violated the terms of the then extant injunctive order**. (Emph.added) Yet plaintiffs' fail to explain in detail -- or indeed generally, which of these acts constitutes a violation of some constitutional right. Mere violation of these orders to (sic) not automatically give rise to a violation of a constitutional right.

It may be that orders or property judgments can create protectable vested property rights. Nevertheless, "there can be no vested right, however, in a verdict, order, or judgment while it remains subject to the control of the court in which, or by which it was rendered, or while the order or judgment is subject to appellate

review." 16 A CJS, Constitutional Law, § 27A, pp 115. In the case at bar the proceedings which gave rise to the injunctive orders, of course, are still ongoing. Thus the orders at issue are still subject to the control of the court that issued it. Moreover, ultimately when a final order is entered in the instant case, all interlocutory orders and findings will be subject to final appellate review. Under the principles quoted above plaintiffs cannot have a vested property right in those orders. This being so no due process claim could be maintained for a violation of those orders. Therefore the Court agrees with defendants that a violation of the injunctive orders alone in this action could not serve as an independent basis for a constitutional claim. Therefore the Court will grant the defendant's motion as to any constitutional claim against the defendants which might have been premised solely on a violation of the prior orders entered in this case. With these conclusions in mind, the Court now turns to examine the specific instances of misconduct in the Amended Complaint alleged to have been taken by the remaining individual defendants.

In the Amended Complaint, para 94 Daniels is alleged to have brought an ordinance violation charge on July 2, 1984 against Qualls and that it was ultimately dismissed. Arguably at issue here is a claim for malicious prosecution. The parameters of when a so-called malicious prosecution may be the basis of a section 1983 claim were recently examined in *Richardson v City of South Euclid*, 904 F2d 1050 (CA 6 1990) in light of its prior holding in ***Dunn,*** *supra*, the latter case which plaintiffs rely on. In *Richardson, supra*, 1053, the Court explained:

> *Dunn*, as the Richardsons assert, could support the proposition that malicious state prosecution may underlie a section 1983 claim. But, we said in *Dunn* that to state a claim for malicious prosecution under section 1983 a plaintiff must allege the misuse of a legal proceeding so

> egregious as to subject the aggrieved individual to a deprivation of constitutional dimension, and the tortfeasor is acting under the color or state law. *Id* at 135. State prosecution for refusal to waive one's fourth amendment rights [i.e. as in *Dunn]* is not the same as prosecution under an untested, presumptively valid, city ordinance. Where the former subjects an individual to a "deprivation of constitutional dimension," the latter does not.

In the case at bar, para 94 alleges nothing more than an **attempted prosecution** of Qualls for an ordinance **violation**. The **ordinance at the time** was the subject of **conflicting** trial court **opinions** as to its **validity**, and indeed in material **parts**, its constitutionality was **ultimately sustained**. (Emph. added) Under *Richardson*, this conduct does not amount to a constitutional violation. Accordingly to the extent that Daniels' liability is premised on para 94, he is held to be immune.

This conclusion also obtains with respect to the liability asserted against Love and Shapiro based on the issuance to Qualls of an ordinance violation on May 10, 1985, see Amended Complaint: para 99[7], against Kunik based on his stated intention to issue an ordinance violation issued on June 14, 1985, *Id,* para 107[8]; against Vann based on the issuance of a complaint to Brusse on July 1, 1985, *Id,* para 17; against Robinson based on his issuance of a notice of violation, *Id,* para 136; against Lang based on the issuance of several

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This is the sole remaining basis liability against Shapiro. Therefore she is entitled to summary disposition in full.

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This allegation was Kunik's only connection with the case. He is entitled to summary disposition in full.

citations on July 3, 1985, *Id,* para 132 and 149; against Aazaad, Kemp, Michalik and Robinson[9] based on the ordinance violation complaint filed on or about May 26, 1986, *Id,* para 169; against R. Wilson for issuance of a building and zoning violations charges against Quails on August 29, 1986, *Id,* para 191.[10]

Proceeding through the allegations of the Amended Complaint, the next defendant not previously granted summary disposition is Monteleon. It is alleged in paragraphs 103 - 104 that she refused, but ultimately gave him a license application and also informed him that several inspections of the premises would be required. Quite frankly the Court is at a loss to ascertain what constitutional right is at issue here. Indeed it is not even apparent that the conduct alleged amounts to a state tort. In any event whatever constitutional right may have been violated was not so clearly established. Monteleon is entitled qualified immunity and summary disposition.

Next at issue is the allegation in the Amended Complaint, para 110, that Daniels had made statements, which were reported in the Detroit News, that it was proven that plaintiff was selling fireworks to children. At best these allegations might assert liability for defamation and involve Quails' interest in his reputation. Yet as noted in *Siegart v Gilley,* 500 US ; 111 S Ct 1789; 114 LEd2d 277, 288 (1991)

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These allegations were the only connection that Kemp and Michalik had with the case. Therefore they are entitled to summary disposition in full.

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This was the only allegation against Wilson. Therefore he is entitled to summary disposition in full.

> "reputation by itself [is] not a liberty interest protected under the Fourteenth amendment... Defamation, by itself, is a tort actionable under the laws of most states, but not a constitutional deprivation."

Also see *Paul v Davis*, 424 U S 693; 96 S Ct 1155; 47 LE2d 405 (1976). Thus under *Siegart*, it is doubtful whether the allegations in para 110 establish a constitutional violation. In any event given the uncertain basis of a constitutional violation based on alleged defamatory statements it cannot be said that there existed a clear right. Accordingly the Court finds the remaining basis of liability pled against Daniels also to be subject to qualified immunity and accordingly he is entitled to summary disposition in full.

The next events described in the Amended Complaint surround Qualls' request to have the storage facilities at his premises inspected. *Id*, para 111. It is alleged that Malik cancelled an inspection previously scheduled for June 15, 1985. Evidently Malik stated that the reason for the cancellation was a lack of manpower. *Id*. para 113. Yet it is noted in the complaint that City personnel kept a surveillance of Qualls' premises throughout this period. *Id*, para 114. When on June 28, 1985 an inspection was performed by Dunn, the inspection was not for the portion of the premises requested by Qualls., *Id*, para 115.

With respect to Malik, it is entirely unclear what constitutional right is at issue. Indeed it is not apparent that his acts in cancelling a previously scheduled inspection constitutes a tort under state law. Malik is entitled to immunity and summary disposition.[11]

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[11]

In Plaintiff's "Proposals And Response..." supra, 81 it is further noted that he ordered inspection by Defendant Love which resulted in the issuance of violations. Yet Love's actions were deemed

In plaintiffs' "Proposals and Response ..." *supra*, 81, it is further noted that he ordered the inspection by defendant Love which resulted in the issuance of violations. Yet Love's actions were deemed subject to qualified immunity on the basis that his conduct violated no clearly established constitutional right. To the extent that Love's acts could be imputed to Malik, he would also appear to be entitled to qualified immunity. Also plaintiff asserts that Malik received reports and directed the activities of other officers during the summer of 1985 with respect to plaintiffs' operations. Yet, this is an insufficient showing to keep him in this case as plaintiffs have proferred no concrete evidence of this. Rather they rely on defendants' proposed stipulation not agreed to by them.

As to Dunn, the Amended Complaint, para 114 alleges that he conducted an inspection, but not of the area that he was requested to inspect. His affidavit also states that the area that he did inspect was the display area of the store. There is no allegation that he entered private areas not open to public access, seized any property or issued a ticket based on his observations.

It is generally held that mere observation of objects in open view does not constitute a search and is not protected by the Fourth

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subject to qualified immunity on the basis that his conduct violated no clearly established constitutional right. To the extent that Love's acts could be imputed to Malik, he would also appear to be entitled to qualified immunity. Also Plaintiff asserts that Malik received reoprts and directed the activities of other officers during the summer of 1985 with respect to plaintiff's operations. Yet this is an insufficient showing to keep him in this case as plaintiff's have proffered no concrete evidence of this. Rather they rely on defendats' proposed stipulation not agreed to by them. These proposed stipulations, however, were not made part of the record and are not before the Court.

Amendment. See *Katzv UnitedStates*, 389 US 347, 351; 88 S.Ct. 507; 19 LEd2d 576 (1967). Thus the observation by a lawfully positioned police officer using his or her natural senses does not constitute a search. *People v Hulsey*, 176 Mich App 566, 569 - 570 (1989). In the case at bar Dunn conducted his inspection, i.e., his observation of various items in Qualls' store, in an area evidently open to the public. No cognizable Fourth Amendment interest is involved here. Nor is any other constitutionally protected interest apparently involved. Accordingly Dunn is entitled to qualified immunity and summary disposition.[12]

Paragraph 116 of the Amended Complaint, alleges that various police officers, including Butucel, entered Qualls' store on July 1, 1985 without a warrant and seized fireworks. It is alleged the store was closed for business and that no consent was given. From the other allegations of the complaint and the defendants' proposed findings of fact it is known that of the remaining individual defendants, Vann also was on the premises as well as Qualls' employee Brusse.

Qualls has submitted an affidavit attesting to the truth of these allegations (as well as all the others). Yet he does not state that he was present. Nor do any of the pleadings or various proposals of fact reflect this. Therefore any testimony of Qualls with respect to this would essentially be hearsay, and thus inadmissible for purposes of this motion. *Jones v Shek*, 48 Mich App 530, 533 (1973). No other testimony or evidence is cited by plaintiff in support of the allegations. Thus in determining whether there exists a material issue of fact, the Court is left with the unrebutted testimony of Vann, who indicates that police officers arrived at the premises to investigate a

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The Court also notes that the allegation that the police kept the premises under surveillance, see Amended complaint para 114, itself invokes no cognizable constitutional protection.

report of illegal sale of fireworks. When they arrived they entered through a door with an "Open" sign on it. They then seized fireworks in the display area.

Plaintiffs assert that the conduct of the officers violated the Fourth Amendment's proscription against unreasonable searches and seizures in that the items were seized without a warrant.

Generally the Fourth Amendment prohibits searches and seizures from being conducted without a warrant. As explained in *People v Alfafara*, 140 Mich App 551,556-557 (1985):

> There are exceptions, however, one of which is when the item is in "plain view". *People v Whalen*, 390 Mich 672, 677; 213 NW2d 116 (1973); *Coolidge v New Hampshire*, 403 US 443; 91 S Ct 2022; 29 LEd 2d 564 (1971). When the police justifiably intrude into an area where a person has a reasonable expectation of privacy and observe evidence or contraband, they may seize it without a warrant if the conditions of the plain view doctrine as set forth in *Coolidge* are present. *People v Myshock*, 116 Mich App 72, 75; 321 NW2d 849 (1982). The requirements of the plain view doctrine enumerated in *Myshock* are:
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> "(1) prior justification for intrusion into the otherwise protected area; (2) the evidence is obviously incriminatory or contraband; and (3) the discovery of the evidence is inadvertent." *Id*, pp 75-76.

In the case at bar the only evidence presently before the Court is that the officers entered through a door which had on it an "Open" sign. They therefore could have reasonably believed the premises to be open, and like an other (sic)member of the public that they could enter. Also the items observed and seized were in a public display area. Therefore the police's presence in this area was

justified, and their observation was inadvertent in that the items were displayed for all to see. Finally with respect to the second element, whether the items were obviously incriminatory or contraband, in *Alfafara, supra,* 537 the Court explained:

> To satisfy this element of the plain view doctrine, the officers need only have probable cause to believe that the object is evidence or an implement of a crime.

In the case at bar at the time of the seizure, Qualls had no valid license to distribute fireworks. Nor is it alleged or evident that Brusse was able to produce one. Nor at this time was there any extant judicial order concerning the sale of fireworks in 1985 or the necessity of a license.[13] Rather there had only been prior court orders and agreements concerning the weight limitations of the ordinance. The officers at the scene including Butucel thus would have had probable cause to believe that the items seized were being sold without the license mandated by the fireworks ordinance and hence contraband.

For all the foregoing reasons the acts of Butucel and the other officers participating in the search and seizure of July 1, 1985, did not contravene defendants' Fourteenth Amendment rights. They are entitled to immunity and summary disposition for the events of July 1, 1985.

The next period of time addressed in the Amended Complaint are those allegations relating to the events of July 3, 1985. The date has some importance in the case since it was then that Judge Hausner ruled that Qualls needed no permit from the City to sell fireworks

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[13] It was only on July 3, 1985 that Judge Hausner ruled that Qualls needed no permit to sell fireworks. See *Qualls II*, supra, p.1

specified in the state statute, MCL 750.243a(3) (a-g) and further issued an injunction enjoining the City from interfering with Qualls' right to store and sell fireworks at retail. Judge Hausner, however, prohibited Qualls from storing more than 100 pounds net weight or 400 pounds gross weight at any one time for retail purposes. See *Qualls II, supra,* 1. This order was entered late in the afternoon after extended hearings before Judge Hausner.

In the Amended Complaint, para 122-126 it is alleged that sometime during that afternoon a fire department inspector appeared at Qualls' business premises and requested consent to perform an inspection. Qualls agreed only to allow an inspection of the buildings. The officer, allegedly acting on the direction of Fire Marshall Robinson, threatened to issue a citation unless Qualls consented to inspection of the trailer. Based on this threat Qualls allowed the search of the trailer. The Amended Complaint does not allege any further consequence of this search.

At least for purposes of resolving the instant motion, the Court finds that the following allegations clearly implicate Qualls' Fourth Amendment rights, and that Robinson violated them by directing a subordinate essentially to coerce Qualls' consent. While it may be that a consensual search does not violate the Fourteenth Amendment, "the presence of coercion or duress would require a finding that consent was not given." *People v Reed,* 393 Mich 342, 361 '(1975) quoting from *People v Kaigler,* 368 Mich 281,294 (1962). Moreover, as evidenced by the date of the decision of *Reed* and *Kaigler,* long before 1985 this had been the law. Accordingly it could be concluded that Qualls' right to be free from not being coerced into consenting to a search was clearly established. Robinson is thus not, as a matter of law, entitled to qualified immunity for the acts alleged in paragraphs 122-126,[14] and defendants' motion as to

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Curiously Robinson submitted no affidavit. Nor did defendants

him must be denied as to these allegations.

Next the Amended Complaint, para. 134-142 addresses Lang's procurement of a search warrant and the search of the premises pursuant to that warrant. Paragraphs 134-135 allege that the business was shut down at the direction, *inter alia*, of Fire Marshall Robinson and [Police Chief] Hart in contravention of Judge Hausner's order. In the abstract this might involve Qualls' property right to conduct business. Yet as noted above he had no license to do business. At best he was conducting operations under the terms of an injunctive order which has ultimately been revised and vacated. This injunction therefore gave plaintiffs no property rights, not only for the reasons stated earlier, but for the reason that it was ultimately vacated as having been erroneously issued. As noted in *United States v United Mine Workers of America*, 330 US 252, 295; 67 S Ct 677; 91 LEd 884 (1947):

> "The right to remedial relief falls with an injunction which events prove was erroneously issued."

Accordingly paragraphs 134-135 cannot sustain a claim for deprivation of any property right, and to the extent that liability of Robinson and Hart is premised thereon, they are entitled to qualified immunity and summary disposition.[15]

Paragraphs 137 - 141 pertain to the procurement and execution of a search warrant on July 3, 1985. Essentially the complaint alleges that it was falsely procured and that in any event the

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address these allegations in their proposed findings. Thus upon a fuller factual development a different result might obtain.

[15] At best such conduct may be constituted a contempt of court and punishable as such. But that issue is not presently involved.

officers who executed it exceeded the scope of the warrant in that they searched 809 and 811 East Seven Mile Road, and in what was seized.

The search warrant at issue was obtained by Lang. In his affidavit he states that on July 3, 1985 he entered Qualls' store, which was at the time open for business, and observed what in his affidavit in support of the warrant were "illegally stored fireworks." This latter affidavit indicates that he observed in excess of 100 pounds of fireworks being stored and sold. Also Lang indicated that he inspected various vehicles and a storage bin located on or near the premises and that they contained over 700 pounds of fireworks. The warrant itself authorized a search for "illegally stored fireworks" at "817 East Seven Mile, two story brick and frame commercial building, a Ford van, a white trailer, and steel storage bin."[16]

Lang was the officer who executed the search warrant. Mueller in fact signed the certified return of search warrant. It indicates that the premises that were searched were those located at 817 East Seven Mile. This is the street address of Qualls' place of business. Amended Complaint, para 2. Additionally Lang's affidavit reflects that the search and seizure activities occurred at the store. Evidently, however, the building located at 817 East Seven Mile is directly adjacent to and connected to other buildings. The police entered these buildings by forcing the doors to these buildings. No fireworks were found in them. A large quantity of fireworks were seized, and are accurately catalogued in the return of warrant.

It is evident that any recovery under section 1983 based on the allegations in paragraphs 137 - 143, is premised on a violation of the Fourth Amendment. Under the Fourth Amendment a warrantless search and seizure is unreasonable per se unless it is shown to be

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A copy of the search warrant was attached.

within one of the exceptions to the rule. *Reed, supra,* 362. The search and seizure of July 3, does not appear to involve any of the exception to the warrant requirement, and therefore its legitimacy, at least for purposes of this motion, stands or falls on the issuance of the warrant and the execution of it.

The first challenge to the warrant is one that is addressed to the accuracy of Lang's affidavit. In *People v Turner,* 155 Mich App 222, 226-227 (1986), *Ivden,* 427 Mich 854 (1986), the court reaffirmed the principle that a person may attack the legitimacy of a warrant by challenging the veracity of factual statements made in the affidavit supporting the warrant by alleging deliberate falsehood or reckless disregard for the truth, and by accompanying these allegations by an offer of proof. *Turner, supra,* also noted that such affidavits are presumed valid and the offer of proof sufficient to overcome this must specifically identify the portion of the warrant affidavit that is claimed false. Allegations of negligence or innocent mistake are insufficient. *Id,* 227. Finally a general attack on the credibility of the perceptions of the affiant is insufficient to justify holding an evidentiary hearing on the matter. *People v Ripa,* 80 Ill App 3d 674; 399 NE2d 1000, 1003 (1980).

In the instant case beyond the mere assertion that Lang's statement concerning the **amount of fireworks stored was false**. there is nothing before the Court that would otherwise be sufficient to overcome the affidavit's presumption of validity. At best it would appear that plaintiff's contention centers on **Lang's perception**. Yet such an attack without more **is nothing more than a conclusory allegation** which at best would seek to test the credibility of Lang's perception. This is simply an insufficient basis to mount an effective assault on Lang's affidavit. *Ripa, supra,*. Accordingly no Fourth Amendment claim could be based on the Amended Complaint, para 137-138. (Emph. added)

The second basis for a possible Fourth Amendment claim is that the scope of the search warrant was exceeded in that area not

designated in the search warrant were searched. This is based on the fact that the search warrant only indicated the premises at 817 East Seven Mile were to be searched and that the police officers searched adjoining buildings by entering through connecting doors. These adjoining buildings had separate addresses which were not listed on the face of the warrant.

Generally the right of an officer executing a search warrant is strictly limited to its mandate both as to the place and the thing search for. 2A Gillispie, Michigan Criminal Law and Procedure, § 871.302. Nevertheless the rule also is that an error in description is not always fatal *United States v Judd*, 889 F2d, 410, 1413 (CA 5 1989). Courts have upheld the searches of buildings which adjoined the one described in a search warrant even though the buildings had different addresses than the one designated in the warrant, where the buildings were joined and accessible internally through connecting arches or doorways and where the owner of the building expressly designated to be searched also controlled, and ran his business from the adjoining buildings. In essence the multiple buildings were deemed to constitute one building, and the police executing the warrant were justified in treating all of the buildings as one. *United States v Lemmons*, 517 F2d 662, 665-666 (CA 6 1975), *certden*, 429 US 817; 97 S Ct 60; 50 LEd2d 77 (1976); *United States v McCain*, 677 F2d 657, 660-661 (CA 8, 1982); also see *Judd, supra*, 1413.

In our case the situation is little different than in *Lemmons* or *McCain*. The buildings at issue were all owned or controlled by Qualls. Also they were all internally connected. In a functional sense they constituted one building. In any event from the standpoint of a reasonable police officer, they could certainly be viewed as one building. There thus occurred no Fourth Amendment violation.

The final Fourth Amendment issue raised in the Amended Complaint with respect to the July 3, 1983 (sic, [**1985, the day the protective order issued**]) search is that the **police and fire officers seized all fireworks at the scene, and not just those stored**

illegally, and thereby exceeded the scope of the warrant. (Emph. Added) See 2A Gillespie, *supra*. Yet is(sic) has been held that objects may be seized during the execution of a search warrant even if not named therein if the officers on the scene have probable cause to believe it to be a fraud, instrumentality or evidence of a crime. *Coolidge v New Hampshire*, 403 US 443; 91 S Ct 2002, 29 LE 2d 564 (1971); *Texas v Brown*, 460 US 730; 103 S Ct 1535; 75 LE 2d 502 (1983). Application of this rule requires that the objects being seized be in a place where the police otherwise had a right to be; that is, the objects be in "plain view." See *Horton v California*, 496 US 128, 1120 S Ct 2301; 110 LE 2d 112 (1990). In 2 La Fave, Search and Seizure (2nd Ed 1987), § 4.11 (b), p 337, the commentator noted, in explaining the scope of this rule:

> It has been said, for example, that objects not named in the warrant may be seized if they "clearly and definitely relate to the behavior which prompted the issuance of the search warrant," if the officers "had a reasonable basis for believing that the seized evidence was reasonably related to the offense which formed the basis for the warrant," if the officer had "a reasonable basis for drawing a connection between the observed objects and the crime which furnished the basis for the search warrant," if the items have "a reasonable relation to the purpose of the search," or if there is "a nexus between the item to be seized and the criminal behavior." (Authorities omitted).

In the instant case, the return of the warrant clearly identified what items were taken. Assuming for the moment that many of these items were not contraband, per se, nevertheless, under the foregoing authorities, they were subject to seizure. First, all of the items were reasonably related to offenses which formed the basis of the search, namely the suspected presence of illegal fireworks. In any event, the

officers could have reasonably believed that the items were evidence in establishing that Qualls had exceeded the lawful weight limit prescribed by the ordinance. This is so since proving that Qualls had exceeded his limit it would have been necessary to show what quantity of fireworks were present on the premises.(sic) The Court therefore concludes that the officers had probable cause to seize the items that were taken.

For all the foregoing reasons the Court concludes that the search and seizure of items at Qualls' place of business on July 3, 1985 as described in the Amended Complaint, para. 137-140, did not violate the Fourth Amendment or in any event no clearly established right under the Fourth Amendment was violated. Accordingly any officer, including Lang's participation in the search and seizure of items is subject to qualified immunity.

The next set of allegations in the Amended Complaint concern the activities of the police on July 3 - 4, 1985 in allegedly threatening potential customers with arrest for possessing illegal fireworks, searching the purchases of customers after they had made purchases and in one instance actually arresting a person on disorderly conduct charges. *Id.* paragraphs 143 - 146. While the Amended Complaint does not denominate the names of specific officers who participated in such activities, the various affidavits filed in support of the original motion for summary disposition filed on behalf of defendants' motion reflect that the following officers who are still defendants in this case were or may have been involved in these operations: Aazaad, Baker, Butucel, Dunn, McFarland, Michalik, Mueller, Parker, Peterson, Savinsky, Smith, Sneed, Upshaw and Whitfield. Potentially, two constitutional claims are raised in these paragraphs. First, is a Fourth Amendment issue. Yet except for one instance to be dealt with shortly all those who stopped, searched or arrested were customers or potential customers of Qualls and <u>not</u> plaintiffs in this case. Generally Fourth Amendment rights cannot be asserted vicariously. *Rakas v Illinois*, 439 US 128, 133 - 134; 99 S Ct 421; 58 LEd 2d 387 (1978).

Thus, the owner of a business has no standing to assert Fourth Amendment rights of third parties, such as customers, who are searched even if the search or seizure is conducted on the business premises. *San Jacinto & loan v Kacal*, 928 F2d 697, 704 (CA 5, 1991). In the case at bar activities detailed in the Amended Complaint, para 143 - 146 all were directed to third persons not parties to the instant case. Plaintiffs therefore have no standing to assert any Fourth Amendment violations that may have occurred.

The other potential constitutional claim involved here is that the police's activities interfered with the operation of Qualls' business and this constituted a deprivation of property with (sic) due process. The short answer to this claim is that at the time Qualls had no right to operate a retail fireworks establishment in the city since he did not possess a license. While it may be that Judge Hausner's injunctive order enjoined the officers from interfering with Qualls' operation, that injunction conferred no property right on Qualls or the other defendants (sic) since in the very least, it was still subject to the control of this court or appellate proceedings, see 16A CJS, Constitutional Law, § 27A, pp 115, and, in any event, it was ultimately vacated, see *United States v United Mine Workers, supra*. Because Qualls had no property right created by state law to conduct his fireworks operations during July 1985, he can have no Fourteenth Amendment claim based on the defendants' activities having interfered with his business.

For the reasons explained, the Amended Complaint, para 143 - 146 cannot give rise to any constitutional claim, and any defendant whose liability rested on these allegations would therefore be entitled to qualified immunity and therefore summary disposition.

The foregoing discussion also serves as a basis for finding that the police/fire officers' activities concerning Qualls' business operations on July 4-6, 1985 (with the exception of Mueller smashing

a window of a truck owned by Qualls) do not give rise to cognizable constitutional claims. These alleged activities are recounted in the Amended Complaint, para 153-157, 159-160. In summary they allege that the business was closed for a day, access to parking lots were blocked, a police officer, Lipscomb, refused to verify whether a certain firework could be legally purchased, police officers arrested a third person and another officer, Hine, threatening to arrest Qualls or others if they interfered with the activities of the police.

Any claims of a constitutional dimension either rest on a property right found not to exist or a Fourteenth Amendment right of a third person. Therefore, any defendant whose liability is premised on these activities is entitled to qualified immunity and summary disposition as to these allegations.[17]

The last potentially actionable incident relating to police activities directed toward Qualls' business operations during this time is pled in the Amended Complaint, para, 161. There it is alleged that when **Perez, a plaintiff in this case**, exited Qualls' store, she was confronted by, *inter alia,* Hines, who without her permission **seized a package** of fireworks that she was carrying, and **detained her by handcuffing her**. She was **charged** with violating Code Section 23-4-3 (now section 19-3-64(a)) which makes it illegal for persons to **possess**, sell or expose for sale any **fireworks** unless the person is **18 years or older** and the fireworks are those enumerated within that section. Ultimately these charges were **dismissed**.(Emph. added)

Defendants largely concede that Perez was arrested, and that a sealed package of fireworks was taken from her. The fireworks

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Defendants concede that Mueller is not entitled to qualified immunity for breaking the window of Qualls'truck. Thus the allegations contained in para. 158 survive as a source of liability.

found in the bag were a package of "Silvery Flowers" which is a sort of fountain, and six packages of "Rio Snappers." It is unclear what type of fireworks these are. Moreover, it is not asserted that defendants had either an arrest or search warrant that entitled them to stop Perez.

Within these allegations are possibly two Fourth Amendment violations, namely an unreasonable seizure of Perez herself, resulting from her arrest, and an unreasonable search and seizure of Perez's bag of fireworks. Both are obviously at issue here because of the lack of an arrest or search warrant.[18]

With respect to Perez' arrest, it is well settled that:

> "the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." (Emphasis added).

Michigan v DeFillipo, 443 U S 31, 36; 99 S Ct 2627; 61 LE2d 343 (1979). At this point it is important to note that it may be that under state law an officer can effect a warrantless arrest of a suspected misdemeanant only for misdemeanors committed in the officer's presence, see *People v Dixson*, 392 Mich 691,697-698 (1974); *People v Ward*, 73 Mich App 555, 558-559 (1977); MCL 764.15(91) (a). Nevertheless, this requirement is not grounded in the Fourth Amendment. *Barry v Fowler*, 902 F2d 770, 772 (CA 9, 1990) (and cases cited therein); *People v Trapane*, 3 Cal Rptr 3d 433; 1 Cal App

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[18] Plaintiffs also assert there was an unconstitutional deprivation of property resulting from a malicious prosecution. Yet for the reasons explained earlier merely because the acts of the police constitute malicious prosecution, it does not follow that a constitutional violation has been shown.

4th Supp 10, 13-14 (1991) (and cases cited therein). Thus in *Barry*, the court found that the plaintiff in a 42 USC § 1983 action based on the warrantless arrest of the plaintiff for a misdemeanor committed outside the presence of the arresting officer, could not show a Fourth Amendment claim merely because the misdemeanor was committed outside the arresting officer's presence. In our case the issue of whether Perez's arrest violated the Fourth Amendment thus rests on whether the arresting officers had probable cause to believe that she possessed fireworks in violation of the ordinance.

In *DeFillipio, supra,* 443 US, 36-38 the Court described the general standards for determining probable cause:

> The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted ... is irrelevant to the validity of the arrest .... 'Probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution in believing the circumstances shown, that the suspect has committed or is committing or is about to commit an offense.

As noted in I Gillespie, *supra,* 391, citing to *People v Degraffenreid,* 19 Mich App 707 (1969):

> While the mere presence of a person at the scene of a crime even with knowledge that a criminal offense is about to be or is being committed, is not enough to support a conviction as an aider or abettor, it is enough to establish probable cause justifying his arrest.

In *People v Hunter,* 72 Mich App 191 (1976) and *People v Clifton Fuqua,* 146 Mich App 250 (1985) the Court held that the police had

probable cause to arrest occupants of a car which had been connected to a robbery which had occurred shortly before. By way of contrast a police policy to arrest all occupants of cars believed to be stolen without taking into consideration other circumstances such as the length of time elapsed from the theft of the car does not constitute probable cause. *People v Harrison*, 163 Mich App 409 (1987). Additionally police may properly take into consideration the crime problem in a particular locale in making probable cause determinations 2 LaFave, *supra*, 71.

In the instant case it is undisputed that Perez was seen exiting from Qualls' store holding a sizeable brown paper bag. The police who were in the area had been advised, and in fact had discovered through prior observations, that fireworks were being sold which were illegal under the ordinance. Indeed prior searches of others had borne this out. These circumstances could reasonably lead Hines to believe that Perez had purchased fireworks illegally sold or illegal to possess under the ordinance. Accordingly, her arrest did not violate the Fourth Amendment, and no liability under section 1983 can be imposed under it.

The other Fourth Amendment issue is the search and seizure of Perez's package. Generally, however, the police are not precluded by the Fourth Amendment from making a search incident to lawful arrest. *United States v. Robinson*, 414 US 218; 94 S Ct 467; 38 LE 2d 427 (1973). Also the seizure of the fireworks was proper since they constituted evidence of the crime with which Perez was charged. *Coolidge, supra*. Therefore no Fourth Amendment violation arose out of the search and seizure of Perez's package.[19]

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[19] At this point it should be noted that it is irrelevant whether Perez was charged with the ordinance violation before or after the search since Hines had probable cause to arrest her independent of what was in the package. See 2 Lafave, supra. 515-517. Also irrelevant

Lastly, relating to incidents which occurred in 1985, the Amended Complaint, para 163, alleges that **Williams destroyed evidence in the form of tape recordings of radio transmissions made of certain days that defendants had been ordered by court order to preserve**.(Emph. added) Williams, however, gave unrebutted testimony that the court order at issue was never transmitted to him, and that the tapes at issue were reused after 90 days in accordance with the normal practice.

Plaintiffs in their "Proposals and Response ..." pp 31-32 urge the Court to find that the destruction of these tapes was intentional and done for the purpose of destroying evidence of allegedly wrongful acts of the police officers.

Even if plaintiffs' suggested finding of fact was adopted,[20] nevertheless, no actionable federal claim arises. First plaintiffs fail to point out what federal right was being violated. All that apparently is involved here is the violation of a court order. Yet this is punishable if at all through contempt. Compare, *Birkenshaw, supra.* As explained previously, interlocutory orders could not give rise to property interests protected by due process. The Court finds no clearly

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is whether Perez was ultimately taken into custody. Id. 552. *People v. Morse*, 68 Mich. App. 450 (1976.) Also irrelevant is that parts of the ordinance may ultimately be declared unconstitutional or void. See *Defillipio.*At the time the ordinance was subject to conflicting interpretation by this Court alone, not to mention other Courts such as Recorders Court. Finally, it was irrelevant that the police officer's acts may have violated the terms of Judge Hausner's injunction. See for example, *Birkenshaw v. Detroit* 110 Mich. App. 500, 512-13 (1981) lv. den., 417 Mich. 913 (1983).

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Plaintiffs, however, cite no specific evidence to support their proposal.

established constitutional right, if any, to have been violated by Williams (or the City) for destroying certain tape recordings.

This then concludes the Court's decision of the various allegations of liability against the individual defendants which are premised either on the denial of the 1985 license, the claims of malicious prosecution or on other events which occurred in 1985. In summary, only two instances of conduct potentially give rise to section 1983 liability for which no qualified immunity obtains. These are the searches which occurred on July 3, 1985 of a certain trailer which was allegedly directed by Fire Marshall Robinson, see Amended Complaint, para 122 - 126; and **Mueller's smashing of a window of a truck owned by Qualls along with the seizure of certain photographic equipment**. *Id.*, para 158. (Emph. added) Thus because the Amended Complaint or other documents otherwise fail to indicate any other basis for liability against the following individual defendants, they are entitled to summary disposition as to any liability under 42 USC § 1983 on grounds of qualified immunity:

Rayo Baker, Ralph Daniels, William Dunn, Steven Hine, Arnold Joseph, Danny Kemp, Thomas Koval, Raymond Kunik, Richard Langt, Philip Lipscomb, Gregory Love, Hilda Montecolm,(sic),P. O. Donald Robinson, John Sanders, John Savish, John Sanders, Esther Shapiro, Joseph Smith,William Sneed,Harold Upshaw, Frank Ward,Robert Williams,Roger Wilson [21]

Also partial summary disposition will be granted in favor of Fire Marshall Robinson with respect to any liability founded on the Amended Complaint, para 118, 134, and 147, and Aazaad for

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It should be noted that the Amended Complaint, para. 167 was merely a general allegation in which many of these individuals were named. Without more, no liability can be premised merely on this paragraph.

liability arising out of *Id.* 164 and Mueller
for liability based on *Id.* para 158.

The events in 1986 recounted in the Amended Complaint which form an arguable basis of liability under 42 USC § 1983 revolve about a **series of searches and seizures**, which occurred between May 26 and June 27, **1986**,
as well as the issuance of several search warrants, the **arrest** of Qualls and **damage to Qualls' stock** which had been seized **by the police. Amended Complaint, para 169-190**.[22]

According to the Amended Complaint, para 169, on May 26, 1986, Aazaad, Kemp and Michalik made a warrantless inspection of Qualls' premises.Qualls allowed the inspection only after protesting it and after they threatened him. It was further alleged that these officers stated they were acting under orders of Fire Marshall Robinson. Arguably these allegations are supported by Qualls' affidavit attesting to their truth.[23]

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The Court notes that the Amended Complaint also alleges that Qualls was the subject of several notices of ordinance violation complaints. Id., 160,169, 191. For the reasons stated earlier, the issuance of these notices or complaints cannot form the basis for Plaintiffs' section 1983 claim. Also the Amended Complaint, para. 165, 168 alleges that the City took various investigative measures in 1985 or 1986. Yet these activities, by themselves, do not reflect any constitutional violation or other federally protected interest. Thus the Court finds that these,too, cannot form the basis of a section 1983 claim.

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Because Qualls was present, he would be competent to testify to what occurred. Thus his affidavit, with respect to these allegations, is competent.

Aazad in his affidavit admits he took part in the May 26 inspection but that Qualls allowed it and did not protest. Both Aazad and Michalik in their affidavits indicate that they were indeed acting at the direction of Fire Marshall Robinson.

For the reasons explained earlier with respect to the July 3, 1985 inspection, see Amended Complaint, para 124-126, this Court finds that there is a sufficient factual basis upon which to predicate a Fourth Amendment claim based on the May 26, 1986 search, and that, at least presently, these defendants are not entitled to qualified immunity, as a matter of law, with respect to this inspection.

Next the Amended Complaint, para 170 alleged on June 18, 1986 that McCartha gave false or incomplete testimony to obtain a search warrant of Qualls' premises. In McCartha's affidavit he avers that he made several undercover "buys" of what he suspected were illegal fireworks at Qualls' premises, that his belief was confirmed by another officer, and an assistant prosecuting attorney drafted an affidavit and search warrant.

This affidavit is not challenged by plaintiffs. Additionally plaintiffs do not otherwise explain what was false or incomplete about the search warrant affidavit.

For the reasons explained above relative to the allegation that Lang improperly gave false evidence to obtain a search warrant, *Id*, para 137-138, the Court finds that there is no factual basis to hold McCartha liable under section 1983 for his obtaining a search warrant.

Next at issue is the execution of the search warrant on June 23, 1986 allegedly by Zara, Burkheiser, Delor, McCartha, Thomas, Haynes, Tomei, Cox, and Tynon, who allegedly were under direction of Parker and Pritchett. *Id*, para. 171-176. Arguably the Amended Complaint alleges that the execution of the warrant

violated the Fourth Amendment because the officers seized items not within its scope. *Id,* para 171. Its issuance was contrary to Judge Hausner's rulings. *Id,* para 172.

As to the first issue, however, a review of the search warrant shows that it authorized the seizure of items listed in the Amended Complaint. As to the second issue, it assumes that the district court magistrate was somehow bound by the rulings of Judge Hausner. Yet in *Qualls* I, 434 Mich 360, n 35, the Court held that a district court is not bound by the rule of *stare decisis* by the rulings of a circuit court. For the reasons discussed earlier, while it may be that obtaining and executing the search warrant constituted a contempt of court, and may be punishable as such, this does not reflect that by violating Judge Hausner's orders these defendants violated plaintiffs' Fourth Amendment rights.

Also in connection with the execution of the search warrant, it is alleged in the Amended Complaint that in order to secure the premises after the search, the officers used different locks. This required Qualls to break into his own building. Ultimately Peterson delivered to Qualls the keys to the lock. *Id,* 175-176.

At this point it may be questioned whether these allegations, even if true, amount to a constitutional violation, given that the officers were not in violation of the Fourth Amendment in executing the warrant. Plaintiffs have not provided any authority on this issue. Nevertheless, this Court is aware of the general rule that:

> it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant. *Dalia v United States,* 441 US 238, 257; 99 S Ct 1682; 60 LE2d 177 (1979).

In the case at bar resecuring the premises can be considered part of the process of executing the warrant. At the time the warrant was executed no one was on the premises, and a forcible entry had to be effectuated. Rather than leave the premises open, the officers took what can (sic) been deemed reasonable measures to secure Qualls' property from theft. Qualls himself seems to have been minimally inconvenienced by the change in locks, as the keys were delivered to him shortly afterward. It is difficult therefore to find any Fourth or Fourteenth Amendment violation in the officer's resecuring the premises by changing the locks. In any event no clearly established constitutional right has been shown by plaintiffs. Accordingly no claim can be founded in paragraphs 175-176.

In paragraph 173 of the Amended Complaint it is alleged that the defendants engaged in other allegedly unlawful acts, namely:

> A. Failing and refusing to appear for a deposition.
>
> B. Failing and refusing to preserve the tapes of radio transmissions relating to these matters from June 14, 1985 until July 8, 1985 as ordered by the Honorable Helene White in her injunction herein of July 5, 1985,
>
> C. Failing and refusing to answer interrogatories until after three motions to compel were filed.
>
> D. Storing and transporting fireworks seized

from Plaintiff Qualls in a place and manner which the same officials had claimed was illegal and/or unsafe for Plaintiff to maintain and transport the same said fireworks.

E. The issuance of an ordinance violation to Plaintiff for being lawfully engaged in his business on May 26, 1986 (V 238-868).

F. The failure and refusal to return to Plaintiff the items legally seized from him on July 3, 1985.

The matters contained in subsections A and C relate to defendants' alleged failure to participate in discovery. Yet it has been long held that parties to judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right. *N L R B v !nterboro Contractors, Inc,* 432 F2d 854, 857-858 (CA 2 1970), *certden,* 402 U S 915; 91 S Ct 1375; 28 LE2d 661 (1971). Therefore no section 1983 claim could be predicated on these matters.

The matters alleged in subsection B have already been dealt with, and as previously found cannot form the basis of a section 1983 claim. Also the matter alleged in subsection E refers to matters previously addressed by this Court's discussion of why malicious prosecution could not, in the case at bar, form the basis of a section 1983 claim.

As to the allegations in subsection D, at this point the Court is mystified as to what constitutional claim could even arguably be at issue. Therefore, no section 1983 claim can be premised on these allegations.

Finally with respect to subsection F, it involves the failure or refusal to return items taken by the defendants in the July 3, 1985 search. None of the named defendants are specifically named

as having been responsible for this, and thus as to them it does not state an actionable section 1983 claim.

Next at issue in the Amended Complaint are those allegations concerning Burkheiser's obtaining a search warrant on June 245, (sic) 1986 for Qualls' business premises and vehicle. It is alleged that Burkheiser gave false or incomplete testimony to obtain this warrant. A review of the affidavit given in support of this warrant shows that it was based on his own observations as well as the advice of Parker of the Fire Marshall's office, to the effect that some of the items being unloaded for sale at Quails' store were barred not only under city ordinance but also state law.

For all the reasons stated earlier with respect to claims based on the other search warrants, the Court finds that no constitutional rights were violated in Burkheiser's obtaining a search warrant. Specifically the Court notes that plaintiffs do not specifically indicate what portion of his affidavit was false. In any event it appears that at best there would be a challenge either to the credibility of his sensory observations or his legal conclusion that the fireworks observed were illegal under state or federal law. The discussions above reflect that neither of these would be sufficient to raise an issue of fact on the issue. Accordingly he is entitled to qualified immunity and summary disposition with respect to any liability based on paragraph 177.[24]

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[24] The same reasons defeat any claim against Tye for his role in securing search warrants on June 27, 1986. See Amended Complaint, para. 179, 183. Specifically with respect to paragraph 183 there it is indicated that Tye's affidavit was false because " contrary to the sworn statement of Officer Tye no fireworks were to be found in 807-811 East Seven Mile Road " during a prior search. Yet the affidavit does not specify that this address was the one where fireworks were previously found. Also the affidavit was

On June 27, 1986 a search warrant was executed. In the Amended Complaint, para 182, it is alleged that it was illegal Zara is alleged to have,led the search and that the search was illegal. For the reasons stated above relative to prior searches of Quails' premises, this Court finds the police's execution of the search warrant not to invoke any colorable claims under the Fourth Amendment. Zara is thus entitled to qualified immunity with respect to these allegations and hence summary disposition.

Next the Court examines the validity of any liability based on the allegations of the Amended Complaint, para 180-181 that between June 23 and July 3, 1986 certain police officers transmitted descriptions of Qualls' vehicles to the state police and allegedly falsely advised the state police that the vehicles were being used to transport illegal fireworks. These allegations are akin to those involving obtaining search warrants on the basis of false testimony. From the evidence before the Court, it is known from the affidavits of Burkheiser and Tye that they observed, or at least believed that they had seen quantities of illegal fireworks on trucks operated by Qualls or his employees. They therefore, could legitimately pass this information on to other police agencies. Other police officers acting on this information could legitimately rely on this to stop Qualls' vehicle. No constitutional right was violated. See for example *United States v Celio,* 945 F2d 180 (CA 7, 1991).

Next the Court reviews plaintiffs' allegations that McCartha and Habib caused arrest warrants to be issued against Qualls without good cause and with malice. Amended Complaint, para 184. Presumably based on this warrant, plaintiff was later arrested on July 3, 1986. *Id,* 188. Unfortunately neither McCartha's nor Habib's affidavit discusses these allegations. Indeed defendants' "Submission of ... Undisputed Facts ..." does not address these

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based on his observations made prior to the search.

claims. The Court is thus left with a general argument applied to this claim that it involves no clearly established constitutional right. Courts, however, have held that the mere issuance of an arrest warrant does not absolutely shield an officer from liability where it is alleged that it was secured with malice and without probable cause. *Mally v Briggs*, 475 US 335, 341, 106 S Ct 1092; 89 LE2d 271 (1986); *Leslie v Ingram*, 786 F2d 1533, 1535 (CA 11, 1986); *Rodriquez v Furtado*, 950 F2d 805, 811 (CA 1, 1991). Rather such officers enjoy qualified immunity. The standard was explained by *Malley, supra*, 475 US 341:

> Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized ... Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost.

Thus in determining whether a police officer is liable for an arrest pursuant to a warrant, it is not necessary to decide whether the police officer's affidavit in fact established probable cause. *Rodriquez, supra*, 812.

In the case at bar, given the assertion of qualified immunity by defendants, the allegations of the Amended Complaint, para 184, that the warrant was obtained by these defendants without probable cause, without more, could not result in the imposition of liability since neither in the Amended Complaint nor in some other submission have the plaintiffs shown that it was "obvious that no reasonably competent officer would have concluded that a warrant should issue" or that the warrant application itself was "so lacking in indicia of probable cause as to render sufficient belief in its existence unreasonable" *Malley, supra*. Accordingly the Court finds that

McCartha and Habib are entitled to qualified immunity and thus summary disposition with respect to the arrest of Qualls.

Also during this time period, it is alleged that on July 1, 1986 Raymus, as well as other unidentified police officers came into Qualls' business premises and screamed threats and false accusations about Qualls. This allegedly disrupted his business.

No property, however, was allegedly seized. Also it is not alleged that Raymus went into areas other than those open to the public. There is no colorable Fourth Amendment claim. Thus, any relief must be predicated on a Fourteenth Amendment claim of deprivation of some property interest. As noted above, however, Qualls' right to operate his business was based on Judge Hausner's orders. Those orders, as explained above, while enforceable under contempt proceedings, did not give Qualls a property interest. Absent a cognizable property interest, there could be no Fourteenth Amendment violation.[25]

Finally with respect to the events of June 27, 1986, the Amended Complaint, para 184 alleges that numerous officers[26] acted in concert against plaintiffs, interfering with a legal enterprise and confiscating property belonging to plaintiff Qualls. Arguably this paragraph seeks to recover against these individuals on the basis of

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Arguably Raymus' words may have (sic) defamatory. Yet alone this does not give rise to liability under section 1983. See *Paul v. Davis*, supra. [Begging the question for section 1983 analysis whether this personal expression reflected an interdepartmental animus. (emph. added)]

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Those Defendants whose liability is still at issue and who are named in para 185 are Burkheiser, Raymus, Zara,Tye, McCartha, Habib, Youngblood, Keller, Haynes, Butucel,and Peterson.

their participation in a conspiracy. Yet, when the conduct which serves as the underlying basis for a conspiracy claim itself is not actionable then the claims for conspiracy itself must fail. *Singer v Waldman*,745 F2d 606, 609 (CA 10 1984). As explained in *Campbell v. Maine*, 787 F2d 776, 778 (CA I 1986), "The whole is emphatically not greater than the sum of its parts." Thus

> the conspiracy itself, without any actionable wrongs being done thereunder, ordinarily cannot be made the subject of a civil action *Roche v Blair*, 305 Mich 608, 613-614 (1943).

In the case at bar none of the acts of the defendants during this time have been found to be actionable. Therefore any conspiracy claim in para 185 must fail.

This analysis also serves to render any conspiracy claims against Hart and Bannon based on their meeting on June 26, 1986, see Amended Complaint, para 178, not actionable. In short none of the events which occurred after that date has proved to amount to any actionable claim under section 1983. Therefore, they cannot be held liable on a civil conspiracy claim based on these events.

This then completes the Court's analysis of claims under 42 USC § 1983 against the individual defendants for events which occurred in 1986 as pled in the Amended Complaint. As found above there still remains a basis for imposing liability on defendants Aazaad, Kemp, Michalik, and Robinson based on the warrantless search of Qualls' premises as described in para 119. Otherwise the other remaining individual defendants are entitled to summary disposition. They are:

Bannon, Burkheiser, Butucel, Habib, Hart, Haynes, Keller, McCartha, Peterson, Raymus, Roby, Tye, Youngblood, Zara.

With the foregoing conclusions in mind the Court next undertakes to examine whether there is any factual basis remaining to hold the City liable under section 1983. At this point it is useful to examine the possible legal bases for holding the city liable for the acts of Aazaad, Kemp Michalik,Robinson and Mueller.[27]

As the Court of Appeals in *Qualls* II, *supra*, 13 noted, liability under 42 USC § 1983 cannot be imposed on municipalities merely on the basis of respondeat superior or vicarious liability. In *Gillette v Delmore*, 979 F2d 1342, 1346 - 134 (sic) (CA 9, 1992), the Court summarized the various ways in which municipal liability under section 1983 can be established.

> A section 1983 plaintiff may establish municipal liability in one of three ways. First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." ... Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with "final policy-making authority" and that the challenged action itself thus constituted an act of official governmental policy. Whether a particular official has final policy-making authority is a question of state law .... Third, the plaintiff may prove that an official with final policy-making authority ratified a

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As noted earlier because this Court has determined that the denial of Qualls' license in 1985 was not violative of his due process rights, there is simply no underlying constituional violation arising out of the denial, and thus no potential liability on the City's part.

> subordinate's unconstitutional decision or action and the basis for it.
>
> (Authorities omitted).

As to whether the second ground for imposing liability on the City can be established this Court note that the two searches which may still be a source of liability were allegedly made under the direction of Robinson, the City's Fire Marshall. Thus the Court's inquiry is directed to determining whether Robinson had final policy making authority. As noted in *Gillette, supra,* this is a matter of state law. Also it is "a legal question to be resolved by the trial judge before the case is submitted to the jury." *Jett v Dallas Independent School District,* 491 U S 701,737; 109 S Ct 2702; 105 LE2d 598 (1989). In making its determination a trial court is directed to examine "state and local positive law, as well as 'custom or usage' having the force of law." *Id.*

As more fully explained in *Gillette, supra* 1349:

> municipal liability does not attach, however, unless "the decision-maker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official -- even a policy making official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.

In *Gillette,* for example, at issue was the authority of a city's fire marshall with respect to hiring and firing. After examining the relevant city charter and ordinances, the Court determined that while the fire marshall had authority to hire and fire, it was the city manager and city counsel who possessed final authority to make city employment policy. Thus the Court found that the City could not be held liable under this theory. Also see *Wolf v City of Wichita,* 883 F2d 842, 868-869 (CA 10, 1989) (final authority to make employment

decision not completely delegated, no liability based on *de facto* firing by superior); *Howell v Evans*, 922 F2d 712, 724-725 (CA 11, 1991) (policy maker of corporation carrying out of state responsibility not held to be final government policy maker where contract required corporation consult with and gain approval of state administrator). *Auriema v Rice*, 957 F2d 397, 400-401 (CA 7, 1992) (authority to make a final decision not tantamount to authority to establish rules, and thus acts of superintendent of police, who could make a final decision, could not serve as basis of city's liability since he had no final policy-making authority). Compare with, *Mandel v Roe*, 888 F2d 783, 793-794 (CA 11, 1989) (final policy making decision with respect to medical decision at a prison held delegated to prison physician, hence county was liable for his decisions); *Angarita v St Louis Co*, 981 F2d 1537, 1546-1547 (CA 8 1992) (police chief held to have final policy making decisions based on finding that he was responsible for entire department, drafting and approving department's general orders) (and see also cased cited therein); *Stone v Holzberger*, 807 F.Supp 1325 (SD Ohio 1992) (county sheriff and prosecutor under state law makes policy for county for the operation of their offices and hence county held liable for their acts). Thus, in the case at bar if Fire Marshall Robinson is the final policy making authority as to the affairs of the fire department then it would appear that the City could be held liable for his acts or acts carried out under his direction which were within the scope of his authority.

Under the City's Charter § 7-801 the fire department is established which is headed by the fire commissioner. Pursuant to section 7-801 the fire commissioner appoints a chief of the fire department. Also the fire commissioner is to appoint a fire marshall. The duties of the fire marshall are set forth in section 7-804, amongst which is the duty to:

> make such inspection of buildings and other places as is necessary for enforcement of the fire prevention ordinances

of the city.

The City Code, Section 19-3-1, *et seq.* is the City's fire prevention code. In section 19-3-1, the fire marshall is described as

> the individual designated as the administrative head of the fire marshall division responsible for the administration and enforcement of this article.

Also under section 19-3-7(c) he is empowered "to promulgate and enforce reasonable rules and regulations." He "by virtue of his office, shall be vested with the full police powers in this city" Section 19-3-19(c). He or his designates are empowered to make fire prevention inspection of premises. Sections 19-3-19(h)(i), (j). Significantly those City ordinances relating to the regulation of fireworks, sections 19-3-62, *et seq.* are included as a divisio[n of] the City's fire prevention code, and thus their administration is within the jurisdiction of the fire marshall.

Based on the foregoing this Court concludes that as the City's fire marshall, Robinson did possess final policy making authority relative to inspection of buildings for purposes of enforcing the City's fire prevention code, generally, and as to the City's regulation of fireworks, specifically. This is so since, while it appears that he serves at the pleasure of the fire commissioner who is deemed to be the head of the fire department, the fire marshall is the officer who is entrusted with not only administering the fire prevention code but also with formulating policies or procedures. No approval of the fire commissioner is necessary and indeed it appears that the fire commissioner does not have the legal authority to veto such policies.[28] Therefore, at least under the facts that are presently before

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Of course, by dint of the fire commissioner's ability to fire at will.

the Court, it can be said that Robinson was an officer with final policy making authority with respect to making inspections for purposes of enforcing the City's fire code and fireworks ordinances. Thus as explained in *Gillette*, his acts are essentially those of the City. This being so it follows the City may be liable under 42 USC § 1983 for Robinson's acts or those carried out under his personal direction which violate section 1983.[29]

With respect to any liability based on Mueller's Acts of smashing a car window and taking a camera, it appears that Mueller was a sergeant in the City's police force. According to the "Submission of the Defendants' Undisputed Facts ...", p 19 he was in charge of the police detail from the 11th precinct which was at Qualls' place of business premises on July 5, 1985. It was during this time that he smashed a car window and seized a camera and which acts serve as a basis for liability against him.

It is apparent, however, that Mueller himself had no final policy making authority. Thus, his act alone, would not constitute an act of the City. Nor does it appear that the act was ratified by any

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he or she has the practical power to effect change in policy. This, however, is somewhat irrelevant since under *Jett* and its progeny this court is directed to look at the legal authority of the fire marshall.

[29]

At this point it is interesting to note that the two inspections in which Robinson allegedly was involved and which serve as a potential basis for liability both involve coerced warrantless searches of Qualls' premises. Also because Robinson had final policy making authority, arguably the acts of Aaazaad, Kemp and Michalik which were allegedly authored and directed by Robinson can form a basis for imposing liability on the City on the basis of notification. *Gillette*, supra.

official who had final policy making authority. For purposes of liability under section 1983 mere inaction after some municipal act has been performed does not amount to a ratification of that act. Rather it must be shown that an official with final policy making authority made a deliberate choice to endorse the action. *Gillette, supra,* 1347 - 1348. In our case there is simply no evidence that any of Mueller's superiors, much less those with final policy making authority, endorsed his acts in smashing a car window and taking a camera as constituting the policy of the City.

Finally, liability on the City might be imposed from Mueller's acts if it can be shown that they were taken pursuant to a formal governmental policy or a longstanding or a persistent widespread practice or custom of the lOCal governmental entity *Jett, supra,* 491 U S 737. The rationale that supports imposing liability on this basis is that a longstanding and widespread practice is deemed authorized by the policy making officials because they must have known about it but failed to stop it *Brown v City of Ft Lauderdale,* 923 F2d 1474, 1481 (CA 11, 1991). As noted in *McConney v City of Houston,* 863 F2d 1180, 1184 (CA 5 1989):

> Sufficiently numerous prior incidents of police misconduct, for example, may tend to prove a custom and accession to that custom by the municipality's policy-makers. Isolated instances, on the other hand, are in adequate to prove knowledge and acquiescence by policymakers.

If Mueller's act is viewed in isolation, then it would appear that there is no basis to find it was part of a longstanding and widespread practice. Yet when taken with the two searches allegedly undertaken by Robinson, it could be argued that Mueller's act was part of a widespread policy to invade Qualls' Fourth Amendment rights. At hand presently, therefore, there is an arguable basis for finding the City liable under section 1983 based on Mueller's act when combined with those of the other remaining individual

defendants.

In addition to the foregoing, within the Amended Complaint it is also alleged that the City negligently failed to maintain certain records and thus caused a cash bond to be imposed on Quails when he was arrested in 1986. *Id*, para 189. However, it is well settled that negligence cannot form the basis of a constitutional claim under section 1983. *Daniels v Williams*, 474 US 327; 106 S Ct 662; 88 LE2d 662 (1986). Thus the City is not liable under paragraph 189 for any violation of section 1983.

Next are the allegations concerning the damage to Qualls' fireworks in 1986 as a result of flooding which occurred in the portion of the 11th Precinct headquarters where they were being stored. In Zara's affidavit it is recounted that the items were stored in the basement of the precinct house. On July 4, 1986, he recounts, a major rain storm caused a flood in the basement with approximately 8 feet of standing water. This flooded not only the place where Qualls' fireworks were stored but also the locker room, armory and other basement areas and their contents were soaked. This affidavit is unrebutted. Based on this affidvit the Court finds that at best the water damage to the fireworks was attributable to the negligence of the police officers and not actionable under section 1983. *Daniels, supra.*

Finally the Court recalls that in the Amended Complaint, para 173(f) liability is premised in part on "the failure and refusal to return to plaintiff the items illegally seized from him on July 3, 1985." Of course as found above, the items at issue were legally seized pursuant to a search warrant. Nevertheless, at some point Qualls may have been entitled to their return. A knowing refusal to return such property might be actionable under section 1983 by a

police officer who was otherwise under a duty to return it. [30] The City might be liable if any of the theories of municipal liability summarized in *Gillette* could be established. Because of the unsettled factual nature of this claim, and because it does not appear the subject of specific discussion by the parties, the Court will decline presently a ruling on the merits of this claim as it may pertain against the City.

For all the above stated reasons the, City is not entitled to summary disposition of claims based on USC § 1983 which are grounded on the acts of the individuals noted above as to whom there yet remains a basis for imposing liability under section 1983 and as to claims based on the Amended Complaint, para 173(f). Otherwise the City is entitled to summary disposition as to all other claims against it which arise under section 1983.

/s/
LOUIS F SIMMONS, JR.
Circuit Judge
DATED: SEP 28 1993

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, et al,

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[30] Presently no individual has been named as defendant to this claim.

-V-

THE CITY OF DETROIT, et al,

Defendants.

Case No. 85-515546-CZ

Honorable Louis F. Simmons, Jr. (P-20491)

ORDER

At a session of the Court held in the City-County Building, Detroit, Michigan on this: September 28, 1993.

PRESENT: Hon. Louis F. Simmons, Jr.
Circuit Judge

The Court being fully advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS HEREBY ORDERED that defendants' motion for summary disposition with respect to liability premised on 42 USC § 1983 is DENIED with respect to such claims against defendants Fire Marshall Robinson, Aazaad, Kemp and Michalik which are based on the search of plaintiffs' premises that occurred on July 3, 1985 and May 26, 1986 as described in paragraph 123-126, and 169 of the Amended Complaint; claims against defendant Mueller which are based on the allegations of paragraph 158 of the Amended Complaint; and claims against defendant City of Detroit to the extent that such claims are predicated on the foregoing acts of said individual defendants or on paragraph 173(f) of the Amended Complaint.

IT IS FURTHER ORDERED that said motion is otherwise GRANTED with respect to any other defendants or claims based on 42 USC § 1983.

IT IS FURTHER ORDERED that said motion is

DENIED without prejudice with respect to surviving claims against the individual defendants based on state tort law.

/s/

LOUIS

F SIMMONS, JR.
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, et al,

Plaintiffs,

Case No. 85-515546 CZ
vs **Honorable AMY HATHAWAY**

CITY OF DETROIT, et al,

Defendants.
_____/

Glen Qualls, In Pro Per
3075 Blacks Comers Road
Imlay City, Michigan 48444
Paul Brusse, In Pro Per
Leticia Quails, In Pro Per
Berta Perez, In Pro Per

David L. Rose (Pro Hac Vice)
Brenda M. Miller (P32309) /Joan Moss
Attorneys for Defendants
CITY OF DETROIT LAW DEPARTMENT
1010 City-County Building
Detroit, Michigan 48226
(313) 224-4550, Ext. 213
_____/

ORDER OF DISMISSAL

This matter comes before the Court on the parties joint motion to dismiss all claims remaining in the instant case, without

prejudice to the rights of the plaintiffs to appeal from the final judgment to be entered herein. The joint motion is based upon a settlement of the remaining claims herein which has been agreed upon by the plaintiffs and the defendants subject to approval by the City Council. As specified in the Orders of June 30, 1994 and September 30, 1994, the remaining claims are:

1. The allegations of paragraph 158 of the Amended Complaint herein concerning Officer Mueller's smashing of a truck window and seizure of a camera: and

2. The allegations of paragraph 186 of said Amended Complaint concerning allegations of defamatory statements by Thomas Raymus;

IT IS ORDERED that the joint motion of the parties to dismiss all remaining claims is **GRANTED**, without prejudice to the rights of any plaintiff to appeal from the final judgment herein on the basis of errors asserted in the entry of prior orders of this Court. Any party may move to reopen this case and/or WCCC No. 92-206-766 NI if the settlement payment has not been submitted to Plaintiffs within ninety (90) days of the date Plaintiffs provide(d) Defendants with Releases.

AMY P. HATHAWAY
CIRCUIT COURT IUDGE
Dated: Jan 31 1995

/s/ Glen Qualls
Glen Qualls, In Pro Per
3075 Blacks Corners Road
Imlay City, Michigan 48444

/s/ Brenda Miller
David L. Rose (Pro Hac Vice)
Brenda M. Miller (P32309)
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Detroit, Michigan 48226
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TEOLA P. HUNTER
WAYNE COUNTY CLERK /s/ Deputy Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, LETICIA QUALLS and ELIZABETH QUALLS,

Plaintiffs,

vs

CITY OF DETROIT,

Defendants.

_____/

Hugh M. Davis, Jr. (P-12555)
Attorney for Plaintiffs
719 Griswold, Ste. 1630
Detroit, Michigan 48226
(313) 961-2255

David L. Rose (Pro Hac Vice)
Brenda M. Miller (P32309)
Attorneys for Defendants
CITY OF DETROIT LAW DEPARTMENT
1010 City-County Building
Detroit, Michigan 48226
(313) 224-4550, Ext. 213

_____/

ORDER OF DISMISSAL

This matter comes before the Court on the parties joint motion to dismiss all claims remaining herein, without prejudice to the rights of the plaintiffs to appeal from the final judgment to be entered herein. The joint motion is based upon a settlement of the

remaining claims herein which has been agreed upon by the plaintiffs and the defendants subject to approval by the City Council. As specified in the Orders of June 30, 1994 and September 30, 1994, the remaining claims are:

The allegations of paragraphs 94-96 of the Amended Complaint herein pertaining to the seizure of 16 fireworks items.

IT IS ORDERED that the joint motion of the parties to dismiss all remaining claims is GRANTED, without prejudice to the rights of any plaintiff to appeal from the final judgment herein on the basis of errors asserted in the entry of prior orders of this Court. Any party may move to reopen this case and/or WCCC No. 85-515-546 CZ if the settlement payment has not been submitted to Plaintiffs within ninety (90) days of the date on which Plaintiffs provide(d) Defendants with Releases.

AMY P HATHAWAY
CIRCUIT COURT JUDGE

Dated: **Jan 31 1995**

/s/ Hugh M. Davis, Jr.
Hugh M. Davis, Jr. (P-12555)
Attorney for Plaintiffs
719 Griswold, Ste. 1630
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(313) 961-2255

/s/ Brenda Miller
David L. Rose (Pro Hac Vice)
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TEOLA P. HUNTER
WAYNE COUNTY CLERK /s/ Deputy Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLENN QUALLS, et al,
Plaintiff(s),

-v- **Case No. 92-206766-NI**

CITY OF DETROIT, et al,
Defendant(s).

ORDER

At a session of the Court held in the City-County Building, Detroit, Wayne County, Michigan, on this:

JUN 30 1994

PRESENT: HON. MICHAEL L. STACEY
Circuit Judge

The Court being fully advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that that part of defendants' motion for summary disposition which pertains to the theory of liability against the City of Detroit under 42 USC §1983 based on the seizure of certain items as pled in ¶¶94-96 of the complaint is **DENIED**.

IT IS FURTHER ORDERED that said motion is otherwise **GRANTED**.

Michael L. Stacey
Circuit Judge

/s/ Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, et al,
Plaintiffs,

v **94-420312 CZ 7/01/94**
JDG: AMY P. HATHAWAY

THE CITY OF DETROIT, et al
Defendants,
_____/

DAVID L. ROSE (Pro Hac Vice)
BRENDA M. MILLER (P-32309)
Attorneys for Defendants
_____/

MUGH M. DAVIS, JR. (P-12555)
Attorney for Plaintiffs
_____/

ORDER ON MOTION FOR SUMMARY DISPOSITION

At a session of this Court held in the City-County Building, City of Detroit, County of Wayne, Michigan
on: MAY 3 1996
Present: (printed) Amy P. Hathway
Circuit Court Judge

This matter having come before the Court on motions by the defendants filed in October 1994 and February 1995 and the parties having filed briefs, and the Court being fully advised of the premises and the positions of the parties and the Court having issued its Opinion of December 27, 1994, and having considered Defendants' second motion for summary disposition and the memoranda and exhibits filed by all parties,

(handwritten) For the reasons stated on the record, (end handwritten) **IT IS ORDERED** that the motion of the defendants is granted and the case is dismissed with prejudice.

AMY P. HATHAWAY
CIRCUIT COURT JUDGE

DATED: (handwritten) May 3, 1996

TEOLA P. HUNTER
WAYNE COUNTY CLERK
/s/ Deputy Clerk

STATE OF MICHIGAN
COURT OF APPEALS

GLEN QUALLS, et al.,

Plaintiffs-Appellees,

v

THE CITY OF DETROIT, et al.,

Defendants - Appellants.

March 6, 1991

Nos. 93518; 115434; 118836; 118837; 118908

GLEN QUALLS, et al.,

Plaintiffs-Appellees,

v

THE CITY OF DETROIT, et al.,

Defendants -Appellants,

and

WAYNE COUNTY PROSECUTOR,

Intervening Defendant-Appellant.

No. 94209

Before: Doctoroff, P.J., and Shepherd and McDonald, JJ.

PER CURIAM.

These consolidated appeals from Wayne County Circuit Court concern the ongoing efforts by defendant City of Detroit ("the City") to halt or control the sale of fireworks at plaintiff Glen Qualls' business, Pyrotechniques, Ltd., which is alternatively known as Ho Lee Kow Fireworks Factory and Fireworks Unlimited.

The roots of this action date to 1978 when Qualls first opened a retail fireworks business in Detroit near the intersection of I-75 and Seven Mile Road. In April 1985, Qualls was denied a city license for retail sale of fireworks. In June 1985, Qualls reopened for business without a license and, with his wife and several of his employees, brought a 42 USC 1983 suit against the City and a number of individual city employees seeking declaratory and injunctive relief and damages alleging that the license denial was part of a conspiracy to deny plaintiffs their constitutional and civil rights.

On July 3, 1985, the trial court, quoting a part of the Michigan Fireworks Act, MCL 750.243a(3)(a-g); MSA 28.440(1)(3)(a-g), ruled that Qualls needed no City permit to sell the fireworks specified therein and entered a temporary injunction enjoining the City from interfering with Qualls' right to store and sell such fireworks at retail. The injunction further specified that:

> Plaintiff shall not have more than 100 lbs. net weight (400 lbs. gross weight) on the aforesaid premises, at any one time, for the purposes allowed by this injunction, while this injunction is in effect.

That same day, the City Fire Department went to the premises, issued a ticket to plaintiff for allegedly having 700 pounds of fireworks on hand and, after obtaining a search warrant, ordered the business shut down allegedly under the City Fire Marshal's summary abatement powers in order to abate a fire hazard. The business was reopened on the morning of July 4, 1985, but later that day was closed down again by the City Police Department allegedly because it was a public nuisance.

Both parties filed motions for contempt as a result of the events of July 3 and 4, 1985. Between October 1985 and April 28, 1986, an evidentiary hearing was held on the parties' cross-motions for contempt for violating the injunction and on plaintiffs' request for declaratory judgment and a permanent injunction. On June 23, 1986, the court, in a 110-page bench opinion, granted plaintiffs' motion for contempt against the City, declared the City's fireworks ordinance invalid, and permanently enjoined the City from interfering with plaintiffs' right to store for retail purposes and to sell fireworks at retail at the premises.

The court further concluded that Qualls was not in contempt and reiterated that he needed no permit to retail fireworks allowed under the Michigan Fireworks Act, §243a(3)(a-g). The court added that the City fireworks ordinance conflicted with state law and United States Department of Transportation regulations in all of its essential parts and was not rationally suited to its regulatory purpose. Additionally, the court held that the City police and fire officials and officers as a pattern of behavior interfered with the sale of items allowed under subsections (a)-(f). Finally, the court concluded that under subsection (g) of the Michigan statute, restricted fireworks, i.e., those not allowed for sale in Michigan under (a)-(f) could be sold at retail so long as the purchaser stated in writing that the restricted fireworks were to be immediately shipped out of state for use out of state. The court concluded that the City was in contempt for interfering with such sales as well.

That same day, City police, with the approval of the Wayne County Prosecutor, obtained a search warrant for the premises and seized allegedly illegal fireworks which the prosecutor and the City claimed were not within the transactional exemption for out-of-state sales of § 243(3)(g). On June 24, 1986, the court entered an order to show cause why the City and the Wayne County Prosecutor (an intervening defendant-appellant in No. 94209), should not be held in contempt. On June 25, 1986, the court entered a supplemental order and injunction ruling that all of the seized fireworks were either legal for sale and use in Michigan or were "legal for sale in Michigan for use outside of Michigan pursuant to MCL 750.243a(3)(g)." The

supplemental order enjoined the City from seizing or taking "any Class C common fireworks pursuant to any process or document without a further specific order of this Court." On July 8, 1986, the court issued its second supplemental order and injunction which found the City in contempt for executing the June 23, 1986 search warrant and ordered the return of all Class C fireworks the City had seized. Nos. 93518 and 94209 are appeals from this series of orders.

In April and May 1988, further evidentiary hearings were held on the question of economic injury to Qualls' business arising out of the July 3-8, 1985, and June 23, 1986, contempts. On December 16, 1988, the trial court entered an order awarding plaintiffs economic loss damages in the amount of $172,910.16 plus statutory interest for those contempts. In No. 115434, the City challenges the contempt findings and that damage award.

The jury trial on plaintiffs' claims for damages for the alleged conspiracy to deprive them of their constitutional and civil rights commenced on February 7, 1989. In pretrial proceedings, defense counsel sought dismissal of all of the individual defendants on the basis of qualified immunity. Plaintiffs' attorney agreed to dismiss sixteen individual defendants and the false arrest and false imprisonment claims but the court denied the summary disposition as to the other forty-seven individual defendants.

During jury selection, plaintiffs' counsel asked to meet with the judge alone without defense counsel to discuss "trial strategy and jury selection." Defendants strenuously objected and the court denied the request. Following their opening statement, plaintiffs sought to waive the jury which apparently consisted of a significant number of Blacks and Detroit residents. Defendants objected and raised the question of improper motivation based upon race, and the trial court denied the request. However, the court opined that since defendants had not insisted on a jury in the April 11, 1988, final pretrial order, the decision to continue trial with a jury rested within the court's discretion. This decision was not appealed.

At trial, and during the testimony of Assistant Fire Marshal Robert P. Michalik, defense counsel Alberta Whitfield objected to the court allowing fireworks that were marked as exhibits and which

the court had previously ruled were legal to be kept in the jury room and to be handled by the jury. Later, plaintiffs' counsel attempted to hand Michalik a fireworks device and asked him if it was legal in Michigan. Michalik refused to hold it saying there were other people in the room, that there was no fire fighting equipment in the room and that it could ignite. During further examination by plaintiffs' counsel, Whitfield interrupted and asked the court to instruct plaintiffs' counsel to put the fireworks down. The court refused to do so and plaintiffs' counsel then asked to light the device. Michalik and Whitfield strenuously objected, but the court overruled the objections. Plaintiffs' counsel did not light the device although the record indicates that the court twice invited him to do so.

During this incident, Whitfield had apparently retreated to the back of the courtroom. Before the lunch break, the court cautioned the jury not to be influenced by the attorneys' behavior and stated that both the court and defendants' attorney knew there was no need no demonstrate the fireworks and that there would be no live demonstrations of fireworks in the courtroom and that any demonstrations would be on videotape. After the jury was dismissed for lunch, the court ordered Whitfield to "stop making speeches in front of the jury" and "signalling to witnesses what to say." Following further heated colloquy the court broke for lunch.

Following lunch and before the jury returned, plaintiffs' counsel objected to the presence of three uniformed fire inspectors behind defense table. The court ruled the inspectors could be present "but not in uniform." Defendants' co-counsel Frank Jackson suggested that the court was abusing its authority. The court responded that the abuse in the trial was related to the conduct of counsel in front of the jury. The court said that although it had never before in thirteen years granted a mistrial, if plaintiffs' counsel requested one, the court would grant it based on defense counsel's behavior. Plaintiffs' counsel made no motion for a mistrial at that time. The trial continued that day and on February 24, 1989, and the court instructed the jury to return on March 6, 1989.

Defendant admits that on March 2, 1989, defendant Robinson sent a letter to Judge Hausner informing him that the judge

should not permit the lighting of live fireworks in the courtroom and that "ALL FIREWORKS SHOULD BE REMOVED FROM THE BUILDING IMMEDIATELY." Late in the afternoon on Friday, March 3, 1989, plaintiffs filed a motion for mistrial and to show cause why defendants should not be held in contempt, alleging in part misconduct by Whitfield. On March 6, 1989, without any oral argument, Judge Hausner declared a mistrial and on March 8, 1989, disqualified Whitfield from the retrial. On March 10, 1989, the court entered a comprehensive order in limine regarding the retrial.

On March 29, 1989, defendants filed an application for leave to appeal with this Court (No. 116326). By order dated May 9, 1989, this Court stayed further trial proceedings and ordered the trial judge to state why he removed Whitfield. At a hearing on May 15, 1989, the court set forth its reasons. One June 9, 1989, this Court denied defendants' application for leave to appeal.

The trial court also denied defendants' motion for partial summary disposition based upon the individual defendants' claim of qualified immunity. The court similarly denied the City's motion for summary disposition for failure to state a claim. Defendants then filed a claim of appeal with this Court from the denials of partial summary disposition rulings (No. 117541) which this Court dismissed.

Defendants then applied for leave to appeal both Nos. 116326 and 117541 to the Supreme Court. By orders dated July 6, 1989, the Supreme Court, in lieu of granting leave to appeal, remanded to this Court for plenary consideration.

On July 12,1989, defendants filed another application for leave to appeal (No. 118908) asserting that Judge Hausner is biased or prejudiced and requesting retrial before a different judge. On July 25, 1989, this Court granted leave and consolidated that appeal with the other appeals.

On April 3, 1990, the Supreme Court issued its opinion in City of Detroit v Qualls, 434 Mich 340; 454 NW2d 374 (1990). In that case plaintiff Glen R. Qualls was charged with violating the portion of the Detroit City Ordinance limiting storage of fireworks in a place of retail sales to a gross weight of less than one hundred

pounds. The Supreme Court held that the storage provision in the City's ordinance does not conflict with, nor is it preempted by, state law. The Court further held that the storage provision is rationally related to the public safety. Entry of the Supreme Court's judgment was stayed pending resolution of the issues in these cases before us, including the overall validity of the regulatory scheme of the City's ordinance.

As indicated, the trial court found that all essential parts of the city fireworks ordinance were in conflict with state law and federal law and, thus, invalid. The trial court also found the ordinance was "not rationally suited to the regulations to regulate the sale of fireworks in the city of Detroit." Presumably, the court meant the ordinance was not rationally related to the city's objective of protecting the safety, health and welfare of its residents. The court ultimately held that Qualls did not need a permit to sell fireworks.

Now that the Michigan Supreme Court has ruled in City of Detroit v Qualls, supra, that the storage limitation provision of the ordinance is not preempted by state law, is not in conflict with the state fireworks act and is a valid and reasonable exercise of the city's police power i.e., that it is rationally related to public safety, our concern is whether the state statute has preempted the field of fireworks regulation with respect to licensure of fireworks retailers and, if it has not, whether the Detroit city ordinance provision concerning such licensure is otherwise constitutionally valid.

Fireworks regulation generally

Regulation of the area has been aptly described in 31A Am Jur 2d, Explosions and Explosives, § 11, p 420:

> The nature of fireworks makes regulation necessary, and the power of government to regulate and restrain the use of fireworks cannot be denied. Indeed, considering the nature of the product, that power is better described as a duty in light of the distinctive nature of explosives and the danger to life

and property attendant upon its use. [Footnotes omitted.]

As to municipal regulation and control, § 13 states:

> Municipalities, in the exercise of the police power delegated to them by the state, may regulate the manufacture, sale, transportation, use, and storage of explosives, and such power to regulate includes the power to prohibit . . . . However, municipal regulations as to explosives, to be valid, must be definite and nondiscriminatory, and must not be arbitrary or unreasonable . . . .

Preemption

A. General Rules:

Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is "subject to the constitution and law." Under the Home Rule Act, MCL 117.4(3); MSA 5.2083(3), a home rule city's exercise of its power is similarly "subject to the constitution and general laws of this state." People v Llewellyn, 401 Mich 314, 321, n 1; 257 NW2d 902 (1977), reh den 402 Mich 954 (1977), cert den 435 US 1008; 98 S Ct 1879; 56 L Ed 2d 390 (1978). A municipality is precluded from enacting an ordinance if the ordinance is in direct conflict with the state statutory scheme or if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. Llewellyn, supra, p 322.

In Llewellyn, at pp 323-325, the Supreme Court set forth several guidelines for determining whether the state has preempted the field of regulation the city seeks to enter:

1) Where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted. Noey v Saginaw, 271 Mich 595; 261 NW 88 (1935).

2) Preemption of a field of regulation may be implied upon examination of legislative history. Walsh v River Rouge, 385 Mich 623; 189 NW2d 318 (1971).

3) The pervasiveness of the state regulatory scheme may support a finding of preemption. Grand Haven v Grocer's Cooperative Dairy Co, 330 Mich 694; 48 NW2d 362 (1951). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption.

4) The nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

> . . .[W]here the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.
>
> ...However, where the court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been preempted. [Llewellyn, supra, pp 324-325.]

Merely because the state has entered into the field of regulation does not preclude a municipality from exacting additional requirements. With respect to this issue, our Supreme Court has often quoted with approval the following passage from 37 Am Jur, Municipal Corporations, §165. p 790 (now 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409):

> . . . The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective.

See e.g., City of Detroit v Qualls, 434 Mich 340, 362; 454 NW2d 374 (1990); Miller v Fabius Twp Board, 366 Mich 250, 256-257; 114 NW2d 205 (1962).

B. Home rule cities' exercise of police power through licensing:

Subject to the foregoing conflict and preemption restrictions or prohibitions, the regulation of trades, occupations, and business activities is a proper subject for the legislative power of a home rule city such as Detroit. People v Litvin, 312 Mich 57, 64; 19 NW2d 485 (1945). MCL 117.4(4); MSA 5.2082(4) specifically allows a home rule city to provide in its charter:

> [f]or the regulation of trades, occupations and amusements within its boundaries, not inconsistent with state and federal laws, and for the prohibition of such trades, occupations and amusements as are detrimental to the health, morals or welfare of its inhabitants.

C. Specific state and city provisions at issue:

The state fireworks statute's provisions concerning licensing and permits for the sale of fireworks are limited. Section 243a(3)(g) simply states that a permit is not required for the sale of fireworks, provided they are to be shipped directly out of state pursuant to federal regulations. Section 243b, which gives municipal authorities power to grant permits for use of fireworks otherwise prohibited by § 243a under certain conditions, also gives the municipal authority power to grant a permit to a resident wholesale dealer or jobber to have in his possession fireworks otherwise prohibited by § 243a for sale only to holders of the above-mentioned "use permits."

Section 19-3-67 of the city ordinance requires a seller of fireworks to procure a license issued by the Department of Consumer Affairs. Included in the application/licensure procedure is an investigation by the fire marshal to determine "whether the applicant is a proper person to conduct such business." The fire marshal must certify that the applicant is a "responsible resident wholesale dealer or jobber or retailer;" a license may not be issued unless the applicant furnishes proof of financial responsibility by a bond or insurance ($100,000 for property damage and $300,000 for personal injury coverage); and the city must be named as an additional insured on the policy. Finally, there is an annual license fee.

We find that § 19-3-67 does not conflict with the state statute and is not preempted by it. First, as the Supreme Court in Qualls noted, the retail sale and storage of fireworks raises concerns that are local in character, such as the location of retailers with respect to densely populated areas, the number of retailers in an area, etc., even

though general problems with reference to fireworks like wholesale storage for shipment, regulation of shipment, and use of different classes of fireworks within the state are statewide concerns. "As hazardous materials, the very nature of fireworks lends itself unquestionably to regulation adapted to local conditions." Qualls, supra, p 363.

Second, the state statute, at least with respect to licensure of retailers, does not expressly provide that the state's authority to regulate in this specific area is to be exclusive. Nor do we discern any such intent implied in the state scheme. Furthermore, and again limiting the inquiry to retail licensure, the state regulatory scheme is not pervasive. Although one might imply from the language of § 243a(3)(a) that a permit is required for the sale of fireworks that stay within the state, there is nothing to preclude a municipality from enacting supplementary provisions governing the issuance of such permits or licenses. Except for the sale of fireworks otherwise prohibited by § 243a to holders of use permits, the state statute is virtually silent on the issue of retail sales licensure. Even where the subject is addressed, the statute does not purport to restrict or delimit the criteria for determining to whom a license or permit may be issued, which is what the city ordinance attempts to do.

The trial court in making almost all of its rulings proceeded on the assumption that the ordinance as a whole was invalid. Now that we have demonstrated that this ruling was incorrect, it becomes apparent that almost all of the trial court's findings must be revisited so that the court may proceed upon legally sound assumptions. For example, in making its rulings on damages and the validity of plaintiffs' claims under 42 USC 1983, the trial court's ultimate findings would necessarily be colored by whether the City was or was not proceeding under a valid ordinance. Furthermore, once the trial court determined that the ordinance in its entirety was invalid, it was not necessary for the court to address whether, under a regulatory scheme that has overall validity, there are portions of the ordinance that may pose constitutional problems. One such problem that was not addressed but which must necessarily be addressed on remand is what may be referred to as "The Standards Rule."

The Standards Rule

While we did not find that the city ordinance conflicts with or is preempted by the state statute, § 19-3-67 of the ordinance may be deemed invalid on the grounds that it does not state an adequate standard for the guidance of the official who is vested with the authority to determine who may be issued a license. If the relevant portion of the ordinance is unconstitutional on that basis, the further question would be whether, because of such invalidity, there is no requirement for a license at all or whether the city must necessarily give a license to anyone who applies. Arguments can be made on both sides of that question and, as indicated, the trial court necessarily did not address the question because of its initial ruling that the entire ordinance was invalid. On remand, we direct the parties and the trial court to address this issue and we offer the following as guidance.

It has long been the law of this state that "reasonable regulations and a uniform rule of action in its determination are essential to the validity of a municipal ordinance and it may not be left to the arbitrary decision of an administrative officer or board." Harrigan & Reid Co v Burton, 224 Mich 564, 571; 195 NW 60 (1923). That is, a law fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct that it prohibits or leaves the judges or jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. People v Buff Corp, 94 Mich App 179, 186; 288 NW2d 619 (1979), citing Giaccio v Pennsylvania, 382 US 399; 86 S Ct 518; 15 L Ed 2d 447 (1966).

As was stated in People v Sturgeon, 272 Mich 319, 322-323; 262 NW 58 (1935), it is fundamental that municipal power to license, when not conferred by the Legislature, must bear a proper relation to the police power and be a reasonable exercise thereof. The legislative body of the municipality must set up such standards to guide and control the licensing body as are reasonably possible and

practicable. In Sturgeon, the Supreme Court held invalid an ordinance which provided, in part, that the Pontiac city commission could authorize the granting of a license for operation of a used automobile business ". . . if, in the opinion of the city commission, the person making the application is a proper and suitable person, and the place to be used for such business is proper and suitable, having in mind the nature and character of the business and the possibility of the commission of crime . . . ."

Two other cases are particularly noteworthy as well as analogous to the case at bar. The first is Hoyt Brothers, Inc v City of Grand Rapids, 260 Mich 447; 245 NW 509 (1932). In Hoyt, the plaintiff was in the business of selling merchandise door-to-door, with ten percent of its profits going to an orphanage. The challenged ordinance, relating to solicitation for charitable purposes, required procurement of a written permit from the city manager upon a written application setting forth the solicitor, articles sold, the charitable purpose, and the portion of sales proceeds used for charity; endorsement of at least six reputable citizens; investigation by a police officer and submission of a report by him to the city manager. Another section of the ordinance stated: "Whenever it shall appear to the city manager from such investigation and report that the charity is a worthy one and that the person or persons making the application are fit and responsible parties, he shall issue a permit . . . ." The plaintiff claimed the ordinance attempted to vest the city manager with arbitrary power in the exercise of which he may either grant or withhold the permit. The Supreme Court agreed.

In so doing, the Court noted that the ordinance contained no rule or provision by which the city manager was to determine whether the charity was "worthy" or the applicant was "fit and responsible." In making his determination, the manager could apply a great variety of qualifications which to him may seem proper or he could grant or refuse the permit solely on captious grounds. Furthermore, said the Court, the manager could apply one test to one applicant and another to another. Id., p 451.

According to the Hoyt Bros Court, it mattered not whether the city manager would in fact act reasonably or arbitrarily and

capriciously. Rather, the sole question in determining the validity of the ordinance was whether it stated a standard for the guidance of the official who passed upon the application for the permit. The Court concluded by stating that the general and indefinite terms used in the ordinance at issue wholly failed to comply with this requisite and the ordinance was therefore invalid.

Plaintiffs herein also contest the requirement, in § 19-3-67(c)of the Detroit ordinance, that an applicant procure a bond or insurance in the amount of $100,000 property coverage and $300,000 personal injury coverage, with the city named as an additional insured. While the nature of fireworks may justify the city's exercise of its police power in this regard (given the potential danger and liability exposure), this provision must be examined on remand as well to determine whether it constitutes a valid and reasonable exercise of the City's police power or, instead, amounts to a prohibiting of fireworks sales within the City.

For example, in People v Buff Corp, 94 Mich App 179; 288 NW2d 619 (1979), the defendant owned and operated a liquor licensed establishment in which it had pinball machines but its application for a license to operate those machines was denied by the city clerk because defendant failed to comply with various provisions of the city code/ordinance. The defendant attacked the ordinance on grounds of preemption (by the Michigan Liquor Control Act) and vagueness.

The ordinance in question required a license for each machine as well as the establishment. The city clerk had authority to disapprove an application for a license if the applicant operated an arcade hall "in a manner generally reputed in the immediate vicinity to be immoral and a menace to the good citizenship of the community, as evidenced by petitions of the affected community." The ordinance also provided that if an application was disapproved, an owner could not reapply for nine months; that the licensee must furnish proof of liability insurance in an amount not less than $500,000 for bodily injury or death; that the licensee must acquire a continuous surety bond in an amount of not less than $5,000; the licensee must pay a license fee of $30 plus $8 for each mechanical

game; and that it must have a bonded security guard on the premises between 8:00 p.m. and 2:00 a.m.

While the Buff Court found that the state liquor control act did not preempt the field, it did find that the ordinance constituted an arbitrary economic prohibition to the placing of pinball machines. In so holding, the Court focused on the required liability policy and the cost of and difficulty in obtaining such coverage, the surety bond, the costs associated with procuring a licensed security guard, and the fact that there was a lengthy waiting period for reapplying after a license was denied. The effect of these provisions was not to regulate arcades but rather to prohibit them and the ordinance was therefore an impermissible exercise of the city's police power.

As to the city clerk's authority to issue or deny licenses, the Buff Court agreed with the defendant that these provisions were invalid because they did not set forth a standard of conduct which is reviewable. The use of the nebulous terminology "immoral and a menace to the good citizenship of the community," stated the court, "falls within the prohibition set forth in Giaccio v Pennsylvania, [382 US 399; 86 S Ct 518; 15 LEd 2d 447 (1966)] and places unfettered discretion in the hands of the city clerk. Buff, supra, p 186.

It is readily apparent that the dangers posed by pinball machines do not approach those posed by fireworks and that greater restrictions may be justified in the latter case pursuant to a city's power to protect the safety, health and welfare of its residents. However, Buff does at least give some guidance as to how to examine the ordinance in question to determine if, in fact, the city of Detroit has not regulated the sale of fireworks but rather effectively prohibited it under the guise of an exercise of its police power.

Record Keeping

With regard to the record keeping provisions of the ordinance, § 19-3-68, if the trial court finds that no license is required because of the standards issue, it need not address the record keeping requirements because there would be none. However, if the trial court finds that there are sufficient standards for the

issuance of a license or if, in the absence of such standards, a license must be issued to all applicants, it must then decide whether the record keeping requirements for licensees are reasonable or whether they are designed to prohibit rather than regulate the sale of fireworks. Here, too, the trial court did not address the issue because it assumed the entire ordinance to be invalid.[1]

The ordinance requires licensees to keep records of a description of the items sold, names, ages and personal descriptions of purchasers and the hour and date of each sale. No entry may be obliterated and the records must be open to any member of the police and fire departments. On remand, the trial court will have to examine each of these requirements to determine after receiving briefs and hearing arguments whether they impose an unconstitutional burden on a legitimate enterprise taking into account the danger of fireworks to the public.

Sales for Shipment Out of State

MCL 750.243a(3)(g); MSA 28.440(1)(3)(g) provides:

> (3) A permit is not required for the following:
>
> (g) the sale of fireworks, provided they are to be shipped directly out of state pursuant to regulations of the United States department of transportation covering the transportation of explosives and other dangerous articles by motor, rail, and water.

In the trial court's June 23, 1986 findings of fact and conclusions of law from the bench, it found that "for a retailer in the State of Michigan to sell items to a user for use out of state, sell them in Michigan for use out of state, is legal, and if that is to be changed, it has to be addressed to the legislature of the State of Michigan . . . Mr. Qualls had a right to sell them that merchandise they had a right to purchase it for purposes of immediate shipment out of state." This ruling is set forth in the court's June 24, 1986, order as

follows:

> It is hereby declared that retailers may sell to consumers items for direct shipment and use out of state pursuant to MCLA 750.243A(3)(g) and that said merchandise under 1.000 lbs used out of state does not require special packaging by the seller.

In a June 27, 1989 interim order, this Court vacated the trial court's order and held that the "shipped directly out of state" provision referred to shipment by common carrier only. The Court found that requiring the retail purchaser to sign a form averring that the fireworks will be transported and used out of state and verifying that the purchaser is at least 18 years old and possesses a valid driver's license is not compliance with the provisions of MCL 750.243a(3)(g).

Subsection (3)(g) is not ambiguous or vague. The obvious purpose of the provision is to permit in-state manufacturers or wholesalers to operate by permitting them to engage in out-of-state transactions, but to preclude retailers like Qualls from making such odd-lot sales to consumers.

Fireworks which are sold and handed to a consumer for his own use are not being "shipped" out of state, but are at best to be carried or taken out of state by the purchaser. A person who purchases fireworks in a paper bag and places them in an automobile allegedly for transportation out of state is not "shipping" them out of state.

Other states have reached the same conclusion on similar facts. In South Dakota Dept of Public Safety v Haddenham, 339 NW2d 786 (SD, 1983), the court affirmed a permanent injunction that precluded licensed wholesalers or manufacturers from selling fireworks to nonresident tourists for transportation out of state. South Dakota prohibited the sale of fireworks from July 6 through June 26 of the following year except that wholesalers could sell to any person or entity outside the state provided that delivery of the fireworks was by properly certified motor carrier or by licensed fireworks

wholesalers or manufacturers or fireworks permit holders and vehicles owned or leased by them. The fireworks dealers obtained a signed acknowledgment from purchasers averring that they were nonresidents and that they would not use the fireworks in South Dakota during the prohibited period. The court concluded the statute was not unconstitutionally vague since persons of common intelligence would not need to guess as to its meaning and fireworks sellers were given fair notice of what conduct was expected of them in order to avoid penalty.

In Pizza v Sunset Fireworks Co, 494 NE2d 1115 (Ohio, 1986), the fireworks dealer required customers to sign an affidavit that the fireworks would be shipped directly out of state and would not be used in Ohio. The court found that if the Legislature had intended to permit sales to consumers, it would not have used only the word "shipped" which means delivery of goods to a common carrier for transportation, but would have added the word "taken." The court quoted with approval from VanCamp v Riley, 16 Ohio App 3d 457; 476 NE2d 1078 (1984) which also stated:

> The legislative intent to protect the people of the state from the improper and promiscuous use of fireworks in the enactment of R.C. 3743.27 to 3743.43, inclusive, is clear . . . . In the protection of the health, safety, and welfare of its people, the state is entitled to some assurance that when fireworks are legally sold in retail for shipment directly out of the state, they will indeed be "shipped directly out of state." The signing of a statement to that effect by the customer does not assure compliance with the law, and is indeed an easy basis for subterfuge . . . .

Accordingly, this Court's June 27, 1989 interim order with respect to § 243a(3)(g) is hereby made final.

Having ruled that the City's overall scheme of regulation is a valid exercise of the police power and that both the city and the state (through the county prosecutor) may regulate or prosecute sales at

retail to individuals who do not ship fireworks out of the state of Michigan, we are now prepared to address the remaining issues before us. As a premise for what follows we emphasize again that the trial court in making its various rulings was proceeding on the incorrect assumptions that the regulatory scheme was void and that the attempt to regulate the alleged out of state sales was improper. By operating under incorrect assumptions, the trial court entered orders and made rulings that are, at best, open to question.

Injunctive Orders

On June 25, 1986 the trial court enjoined the prosecutor from prohibiting alleged out-of-state sales. Since we have held that regulation of such sales is valid, it follows that the injunction must be set aside. Injunctive orders were also issued against the city of Detroit relating to the storage and sale of fireworks. Given the Supreme Court's holdings in City of Detroit v Qualls, supra, and our holdings in this case, these injunctive orders must be revisited to the extent that they operate prospectively. The trial court is directed to hold a hearing and to reconsider its position on the injunctions given the rulings in City of Detroit v Qualls and this case.

Contempt

Nevertheless, the injunctive orders had to be obeyed by the City until they were reversed or modified. Cross Co v UAW Local No 155 (AFL-CIO), 371 Mich 184, 195; 123 NW2d 215 (1963). One of the City's attorneys, Alberta Whitfield, conceded at a hearing in the lower court that both plaintiff and the City had committed a wrong. She stated that for this reason, the City had not taken any steps to appeal the trial court's orders holding the City in contempt for violation of the injunctions. The City further admitted in its brief in case numbers 93518 and 94209 that it had an obligation to comply with the trial court's injunctions until they were reversed. For these reasons, we affirm the trial court's findings that the City was in contempt for violation of the injunctions.

The City argues that despite its own acts of contempt, no damages should be awarded to Qualls because he himself was in violation of the trial court's injunctions and recovery is barred by his own contempt and "unclean hands." It is a well-settled equitable principle that "one who seeks the aid of equity must come in with clean hands." Birkenshaw v Detroit, 110 Mich App 500, 513; 313 NW2d 334 (1981), lv den 417 Mich 913 (1983). In Attorney General v Ankerson, 148 Mich App 524, 544-545; 385 NW2d 685 (1986), this Court quoted the Supreme Court in Stachnik v Winkel, 394 Mich 375,382; 230 NW2d 529 (1975):

> "[The clean hands maxim] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' Bein v Heath, 6 How [47 US] 228, 247 [12 L Ed 416 (1848)]." Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co, 324 US 806, 814; 65 S Ct 993; 89 L Ed 1381 (1944).

The Stachnik Court further noted that the doctrine is "to be invoked by the Court in its discretion to protect the integrity of the Court" and that appellate review is de novo. Id., at 386.

The trial court in its June 23, 1986, bench opinion and its June 24, 1986, order specifically concluded that Qualls was not in contempt. The court found that Fire Inspector Lang alleged that there were 75 pounds of fireworks in a display case, 120 pounds in the sales area, 115 pounds in a fenced enclosure next to the sales area and between 338 and 507 pounds in a supply truck which was on ttie property. Qualls did not contest the City's claim that there were 272

pounds in the store, 357 pounds outside in a supply tuck and 100 pounds in an unused truck four lots away from the business. The trial court ruled that:

> The Court, because of its finding that Mr. Qualls never after the time that he saw the Court injunction become aware of the 400 pound gross weight, never, never violated that weight limitation on the premises at 817 East Seven Mile Road. And the Court finds, as I have already found as a matter of fact, that there never was more than 400 pounds gross weight in the building anyhow . . . .
>
> He had a right, of course, to replenish his supply. If he couldn't do that, he could only sell 400 pounds or go out of business. So I find, first of all, that he never violated my injunction because he never had more than 400 pounds on the premises at 817 East Seven Mile Road.
>
> And also, he was never asked to get into conformity with the injunction if anyone believed he was in violation of it after my injunction was issued. So I find him not guilty of contempt.

Based on a fair reading of the record, Qualls did not come to the lower court with unclean hands. Indeed, if the lower court needed to invoke the clean hands doctrine, the party against whom such a doctrine would be applicable is not Qualls, but the City.

Having held that the City was properly found to be in contempt, we must now address the question of contempt damages. At the outset, it is apparent that given our holding regarding "out-of-state" sales, Qualls would not be entitled to damages for lost profits stemming from such sales since they are illegal. The extent to which the damages awarded included lost profits on illegal § 243a(3)(g) sales is a matter which must be addressed on remand.

As to the remaining contempt damages, we reiterate the principle that although an injunction was improperly granted, it must be obeyed until dissolved and a court has the power to punish disobedience therefor as for contempt. Rose v Aaron, 345 Mich 613, 615; 76 NW2d 829 (1956); Reed v Soltys, 106 Mich App 341, 350; 308 NW2d 201 (1981). The question here becomes one of how those damages should be calculated.

The trial court confined the award of damages to direct business losses incurred after July 3, 1985 through July 8, 1985, and from June 23, 1986 through July 8, 1986. The sole witness at the hearing was Qualls, with the City choosing to challenge Qualls' damage claim through cross-examination rather than presenting any evidence itself.

In its findings, embodied in a December 16, 1988 order, the trial court accepted plaintiffs' method for calculating damages: cost of goods sold less adjustments for unsold stock. The court found undisputed that the fireworks retailed at five times their cost. Using plaintiffs' method, the court arrived at a figure of $35,369.43 in gross sales loss for 1985 and $67,444.04 for 1986. Total gross sales loss was then adjusted by twenty-five percent to reflect average growth rate in sales since 1981. The court then added $3,577.08 in property damage to plaintiffs' building and storage van and for lost merchandise. Total damages thus amounted to $172,910.16 plus interest. The City contests the manner in which these damages were calculated as well as the evidence relied upon.

The City further contends that the trial court relied on erroneous summaries of evidence rather than the evidence itself and that the award of damages was miscalculated. The City asserts that the court failed to reduce plaintiff's gross receipts by his costs and expenses that appear in the record to determine his net profit. The City also argues that plaintiff's business growth calculations were clearly flawed.

Damages for lost profits must be based on net profits rather than gross profits. Getman v Mathews, 125 Mich App 245, 250; 335 NW2d 671 (1983); Lawton v Gorman Furniture, 90 Mich App 258; 282 NW2d 797 (1979). It does not appear that the lower court

reduced the gross profits by any amount for the cost of goods sold. The City also contends that gross profit should be further reduced by four percent for sales tax. As to this claim, plaintiff argued at closing argument that sales tax is not payable until the court makes the damage determination. We believe the lower court correctly declined to make that reduction.

With respect to the court's finding of twenty-five percent business growth per year, we find such damages too speculative to be upheld. For example, the City asserts that according to another of plaintiff's summaries, Trial Exhibit 2, the store did $24,232.12 in gross sales from 11:56 p.m. on June 30, 1984, to 3:19 a.m. on July 3, 1984, but only $18,086.36 in gross sales during the longer period from 7:53 p.m. on June 30, 1985, to 7:09 p.m. on July 3, 1985. The City also points out that plaintiff produced no records for 1987 when the business was also free from any City interference. On retrial the business loss damages, if any, will have to be established with greater specificity. Furthermore, any calculation of lost profits must be based on net profits and exclude profits from illegal § 243a (3)(g) sales. The trial court's award is vacated and the matter remanded for redetermination of contempt damages in accordance with this opinion.

Claims Against Individual Defendants

The trial court's orders relating to the individual defendants were also based on the assumption that the City's entire regulatory scheme was invalid. Now that we and the Supreme Court have ruled otherwise, the claims against the remaining individual defendants will have to be reevaluated. On remand this should be done in a manner consistent with this opinion, the opinion in City of Detroit v Qualls, supra, and the trial court's rulings on those issues which we have remanded to it for reconsideration.

Civil Rights Claims Against the City Under 42 USC 1983

The trial court found that plaintiffs' amended complaint

sufficiently pled a 42 USC 1983 action for illegal searches and seizure under the Fourth Amendment and deprivation of liberty and property without due process of law under the Fifth and Fourteenth Amendments of the US Constitution. We agree that the amended complaint states a cause of action against the city.

The City argues that, as in Harris v City of Detroit, 160 Mich App 223; 408 NW2d 82 (1987), plaintiff has failed to plead the existence of any custom or policy that resulted in the alleged violation of plaintiffs' constitutional rights. The City asserts correctly that to establish the policy, incidents of misconduct must be affirmatively linked to adoption of the policy by the municipality. The City also contends that the complaint is legally insufficient because it does not allege violation of specific constitutional rights.

In this case, unlike in Harris, supra, plaintiffs do far more than simply plead in a conclusory fashion that their constitutional rights were violated pursuant to an official policy or custom of the City. In the present case, plaintiffs pled highly specific facts in support of their claim.

In particular, the following paragraphs in plaintiffs' amended complaint meet the requirement that plaintiffs' plead an official custom or policy affirmatively linked to the City that is violative of plaintiffs' constitutional rights:

> 93. The refusal and denial to issue to Plaintiff his Class "C" COMMON FIREWORKS retailer's license by the City of Detroit was a continuation of a pattern and practice of concert of action by Defendants, and each of them, in furtherance of a conspiracy to deprive and deny Plaintiffs of their property, liberty and livelihood which began in 1978 and has continued to date. The specific acts undertaken in furtherance of this conspiracy to violate Plaintiffs' constitutional and civil rights has included, but is not limited to the following acts and refusals to act:

* * *

G. Failing and refusing to follow any of the normal or standard procedures for the notice of building or fire ordinance violations as contained in the ordinances of the City of Detroit, failing and refusing to follow the license revocation procedures as they are contained in the ordinances of the City of Detroit and failing or refusing to follow the licensing renewal procedures according to the ordinances of the City of Detroit and the customs and practices of the licensing authorities, all without cause and in bad faith for the purpose of harassing Plaintiffs and requiring them to undertake extraordinary legal procedures in order to protect Plaintiffs' constitutional interests in liberty and property.

174. These actions were undertaken in bad faith and after consultation at the highest policy making levels of Defendant CITY OF DETROIT, the specifics of which are presently unknown to Plaintiff.

The complaint specifically alleges a persistent practice by the City's officials or employees directed toward plaintiffs which even if not authorized by officially adopted and promulgated policy is sufficiently common and well settled that it might constitute a custom that fairly represents City policy. On the face of the complaint, actual or constructive knowledge of the custom or policy is attributable to the City or its highest officials. This condoned "custom or usage" is an alternative basis to the official policy requirement for municipal liability under 42 USC 1983. See Pembaur v Cincinnati, 475 US 469; 106 S Ct 1292; 89 L Ed 2d 452, 464, n 10 (1986); Spell v McDaniel, 824 F2d 1380, 1391 (CA 4, 1987). As the Spell Court stated:

[I]n particular cases the question whether the

> "moving force" behind a specific violation was a policy that originated with municipal policymakers, or a custom that policymakers did not originate but effectively condoned, or both, may be determinable only by litigation. [824 F2d at 1391.]

It is also clear as set forth by the lower court that plaintiffs have sufficiently alleged constitutional violations arising out of the City's actions. In this regard, two recent federal decisions that involve somewhat similar situations where plaintiffs ultimately recovered under 42 USC 1983 are instructive. In Chalmers v City of Los Angeles, 762 F2d 753 (CA 9, 1985), the court affirmed a jury verdict for a street vendor who was deprived of Fifth Amendment due process rights by the city's contradictory ordinances governing rending activities. The court held that the implementation and enforcement of the contradictory ordinances by which the vendor was harassed and threatened with arrest made the city liable for constitutional violations and that the existence of post-deprivation state remedies did not bar the action where the vendor was challenging a systematic procedural deficiency depriving her of due process.

In Benigni v City of Hemet, 868 F2d 307 (CA 9, 1988), the court affirmed a jury verdict on the plaintiff's civil rights claim that city police harassed his restaurant and bar in violation of the plaintiffs First Amendment right of association, Fourth Amendment right against unreasonable searches and seizures, and Fourteenth Amendment rights to due process and equal protection.

For the foregoing reasons, viewing the pleadings alone, we find that plaintiffs have stated a cognizable cause of action under 42 USC 1983 against the City of Detroit. Nevertheless, the § 1983 claims will also have to be reconsidered in light of the holdings that the overall regulatory scheme is a valid exercise of the City's police power. This power may not be exercised in a manner that violates § 1983 but the trial court must begin with the now-established assumption that in adopting a regulatory scheme that applied to plaintiffs' business, the City was acting within its authority.

Therefore, while we affirm the denial of summary disposition, we do so without prejudice to the filing of another such motion which the trial court will rule upon after it has decided the other issues which we are remanding for further consideration. Furthermore, upon the completion of discovery, a motion for summary disposition may be filed testing whether taking all of plaintiffs' allegations and evidence as true, plaintiffs will be able to establish a prima facie case at trial.

Barring Defense Counsel from Retrial

Defendants contend that Judge Hausner could not bar attorney Whitfield from further participation in the retrial of the case. Defendants assert that the decision to bar Whitfield is a punitive sanction in the nature of a criminal contempt under MCL 600.1701; MSA 27A.1701. We do not believe that a court's power to bar an attorney from its courtroom and from further participation in a case is solely limited by the power m punish for civil or criminal contempt. Instead, in addition to the court's contempt power, a judge has inherent power and authority to enforce reasonable rules of conduct in his or her courtroom. Code of Judicial conduct, Canon 3(a), subdivisions (2) and (3).

In Matter of Hague, 412 Mich 532, 559; 315 NW2d 524 (1982), reh den 413 Mich 1106 (1982), the Supreme Court specifically rejected the proposition that a trial court may not eject an attorney from the courtroom for any reason absent an adjudication of contempt:

> [A] court necessarily has the inherent power to preserve or restore order by temporarily ejecting from the courtroom disruptive and disorderly persons, including attorneys. See Code of Judicial Conduct, Canon 3(a), subds (2) and (3). Every attorney or party has a full right to be heard. Id., Canon 3(A)(4).
>
> However, the power to remove disruptive

> attorneys may not be used as an artifice or guise to eject counsel with whom a judge has a personal professional disagreement, whose presence "inhibits" the court, or toward whom the judge entertains a personal animosity but who is not, in fact, disruptive or disorderly.
>
> * * *
>
> The power to discipline members of the State Bar, save a proper adjudication of contempt, particularly the power to limit or preclude an attorney from practicing law in any courtroom of the state, is reserved to the Supreme Court. Const 1963, art 6, § 5. See In re Schlossberg v State Bar Grievance Board, 388 Mich 389; 200 NW2d 219 (1972). See also MCL 600.904; MSA 27A.904.

The Hague Court did not expressly consider whether an attorney could be barred from further participation on a specific matter before the court. However, we believe that even though a court may not permanently bar the practice of an attorney before it as Hague states, the court may exercise its discretion to bar further participation in a particular matter. In the criminal context, this Court held in People v Abernathy, 153 Mich App 567; 396 NW2d 436 (1985), that there was no error where the trial court dismissed defendants' original appointed counsel. Although the lower court made no finding of contempt, this Court found that defense counsel was either grossly incompetent or his conduct was contumacious since he persistently refused to submit to the trial court's authority. Id., at 569-572.

United States v Dinitz, 538 F2d 1214 (CA 5, 1976), reh den 542 F2d 1174 (1976), cert den 429 US 1103; 97 S Ct 1133; 51 L Ed 2d 556 (1977), is instructive. In Dinitz, which was on remand from the Supreme Court (424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976)), the Fifth Circuit upheld the disqualification of one of three

defense counsel, after he engaged in improper argument and persisted in doing so despite repeated warnings from the trial court.

The court found that under the facts, the lower court acted within the scope of its discretion. In a footnote, the court pointed out that the ABA Project on Standards for Criminal Justice, The Function of the Trial Judge § 6.5 (Approved Draft 1972), provide:

> 6.5 Deterring and correcting misconduct of attorneys.
>
> The trial judge should require attorneys to respect their obligations as officers of the court to support the authority of the court and enable the trial to proceed with dignity. When an attorney causes a significant disruption in a criminal proceeding, the trial judge, having particular regard to the provisions of section 6.3, should correct the abuse, and if necessary, discipline the attorney by use of one or more of the following sanctions:
>
> (i) censure or reprimand;
>
> (ii) citation or punishment for contempt;
>
> (iii) removal from the courtroom;
>
> (iv) suspension for a limited time of the right to practice in the court where the misconduct occurred if such sanction is permitted by law;
>
> (v) informing the appropriate disciplinary bodies in every jurisdiction where the attorney is admitted to practice of the nature of the attorney's misconduct and of any sanction imposed. [538 F2d at 1221, n 12.]

The note adds that while a judge "should ordinarily impose the least severe sanction that is appropriate to correct the abuse and deter repetition" per § 6.3, the Dinitz Court was convinced that removal was the least severe sanction under the circumstances:

> Certainly, a citation for contempt may have been in order; as Chief Justice Burger has noted,
>
> [h]ere the misconduct of the attorney, Wagner, was not only unprofessional per se but contemptuous in that he defied the court's explicit order. Far from "overreacting" to the misconduct of Wagner, in my view, the trial judge exercised great restraint in not citing Wagner for contempt then and there.
>
> United States v Dinitz, 424 U.S. 600, 612, 96 S. Ct. 1075, 1082, 47 L.Ed.2d 267 (1976) (concurring opinion). But there is no rigid requirement that the use of the contempt sanction chronologically precede the use of the removal sanction in every case. All that sound discretion requires is that thee judge impose that sanction which is (in the words of the ABA Standards- "appropriate to correct the abuse and to deter repetition." By the time Wagner was finally ordered to leave the courtroom, the repetitious character of his misconduct was well established, and there is little reason to believe that a contempt citation would have significantly served to deter the reputation of that misconduct. [538 F2d at 1221, n 12 (emphasis added).]

The course of misconduct which was persistently followed by Whitfield in the instant manner is set forth in the trial record and is accurately summarized by Judge Hausner in the March 6, 1989 proceedings. That record amply supports a conclusion that the City,

some of the individual defendants who testified, and Whitfield persistently refused to submit to the trial court's authority. If Whirfield could be disqualified as counsel in a criminal case, where Sixth Amendment considerations are paramount, disqualification of counsel in this civil case does not deprive defendants of any constitutional right. The Sixth Amendment right to counsel does not extend to an absolute right to be defended by the attorney of defendants' choice. Dinitz, supra; Abernathy, supra.

Defendants also argue that before Whitfield could be disqualified, she was entitled to a hearing. However, Hague does not support that proposition as defendants assert. Rather, Hague merely cites Code of Judicial Conduct Canon 3(a)(4) which provides that every person who is legally interested in a proceeding, or his lawyer, has a full right to be heard. We do not interpret the Supreme Court's reference to this Canon in Hague to require such a hearing. Defendants further err in this aspect of their argument by persisting in analogizing the disqualification of Whitfield to a finding of contempt. Even though Whitfield acted as lead defense counsel at the trial, defendants are and have been represented by multiple counsel throughout the proceedings. As a result of this appeal, ample time has elapsed for substitute counsel to effectively prepare for retrial. It is well within the trial court's discretion having once declared a mistrial based primarily on Whitfield's behavior to preclude her from the retrial. As an officer of the court, Whitfield, like all attorneys, was subject to the court's summary jurisdiction in matters arising from actions or proceedings in the lower court. MCR 9.103(A); MCR 8.122.

Declaration of Mistrial

Decisions on motions for mistrials are within a trial court's sound discretion, and will not be reversed on appeal absent a finding of abuse of discretion resulting in a miscarriage of justice. Anderson v Harry-'s Army Surplus, Inc, 117 Mich App 601;615; 324 NW2d 96 (1982), lv den 417 Mich 1074 (1983). Whether or not the trial court was actually justified in declaring as mistrial is

now a moot point; this Court can hardly restore the trial to its original status reconvening the original jury, and resuming proceedings from the point the trial was discontinued. In any event it is highly probable that had the trial continued the results wouldhave been reversed given our rulings that the trial court was proceeding under incorrect legal assumptions. We therefore decline to address this issue further.

Bias of Trial Judge

We believe that defendants' claims that Judge Hausner is biased or prejudiced against the City or the individual defendants are not well-founded.

MCR 2.003(B)(2) provides:

> (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including a proceeding in which the judge
>
> * * *
>
> (2) is personally biased or prejudiced for or against a party or attorney;

A trial judge will not be disqualified absent a showing of actual bias or prejudice. MacDonald v Ford Motor Co, 117 Mich App 538, 542; 324 NW2d 489 (1982), lv den 417 Mich 970 (1983).

Defendants assert generally that Judge Hausner's rulings over the last eight years reflect his bias against defendants. However, most of defendants' complaints bottom on the fact that they simply disagree with the trial court's rulings. Defendants' argument in this case is similar to recent arguments, raised in Band v Livonia Associates, 176 Mich App 95, 118; 439 NW2d 25 (1989), lv den 433 Mich 920 (1989), where this Court said:

> Defendants base their assertion of bias and prejudice on the fact that the majority of the court's decisions on motions and preliminary matters were against defendants. Repeated rulings against a litigant, even if erroneous, are not grounds for disqualification. The court must form an opinion as to the merits of the matters before it. This opinion, whether pro or con, cannot constitute bias or prejudice. Mahlen Land Corp v Kurtz, 355 Mich 340, 350; 94 NW2d 888 (1959).

Attorney Fees

The trial judge awarded Qualls attorney fees and expenses in the amount of $126,637.23 plus interest as a result of the order of contempt. The judge found it difficult to separate the number of hours spent on the contempt aspect of the case from hours spent on other matters. He commented that the problem is akin to separating the water from the soup. He resolved the dilemma by allocating 86% of the time to the contempt. He also attempted to allocate court and non-court time.

While we are sympathetic to the allocation problem we regret that the attorney fee issue must also be revisited. Here too, much of the City's time was spent defending the overall validity of the regulatory scheme, the issue relating to the out-of-state sales and the damages issue in which we have held that the computations were erroneous or too speculative. Given our ruling in this case, much of that time is not compensable to Qualls and we direct the trial judge to reexamine the formula to determine the extent to which the holdings in Qualls and this opinion might modify the award of attorney fees. From the record before us, we are unable to do so.

Order In Limine

On March 10, 1989, the trial court issued an extensive order in limine consisting of sixteen separate paragraphs relating to

numerous aspects of the trial which was about to begin. For us to review that order at this time would be to grant interlocutory relief in a case which now has a totally different complexion given the rulings in City of Detroit v Qualls, this opinion and the additional rulings that the trial court will have to make on remand as a result of the various holdings in this opinion. We believe it would be entirely inappropriate on our part to anticipate how the order in limine would be changed by the trial judge as a result of the changed nature of the case. We therefore decline to make any rulings relating to the order in limine. Should a new order in limine be issued and should either of the parties file an application for leave to appeal, we will address that situation at the appropriate time.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Martin J. Doctoroff
/s/ John H. Shepherd
/s/ Gary R. McDonald

[1]While we believe the trial court should be the forum to address these issues in the first instance after briefing and arguments of counsel, we offer the suggestion that it makes good sense to require the City to issue a license to all applicants if the restrictions on the issuance of licenses are invalid for lack of standards. At least the City would then be able to regulate licensees which it could not do if no license were required.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CITY OF DETROIT,
DETROIT POLICE DEPARTMENT,

Plaintiff,

vs.

GLEN QUALLS, D/B/A
FIREWORKS UNLIMITED, and
further D/B/A PYROTECHNIQUES LTD. and HO LEE KOW
FIREWORKS
FACTORY,

Defendant.

Honorable J. H. Hausner
No. 81-129-784 CZ

ORDER

SYLVESTER DELANEY
Acting Corporation Counsel

MARY ROSE PROST (P32685)
THOMAS W. DEINEK (P32987)
ANTHONY W. CAMDELA (P33639)
Attorneys for Detroit Police Department
1300 Beaubien
Detroit, Michigan 48226
(313) 224-4438

ORDER

At a session of said court, held in the
Lafayette Building, in the City of Detroit,
Wayne County, Michigan, on
June 6, 1982

PRESENT: HONORABLE JOHH H. HAUSNER
Circuit Judge

IT IS ORDERED that as of Monday, June 7, 1982, during business hours, that the City of Detroit Police Department release all items taken from 817 East Seven Mile Road in the City of Detroit on June 29, 1979 by officers of the Detroit Police Department, provided that the owner of these goods, Glen Qualls, presents himself to the property office of the Detroit Police Department with boxes per U.S. Department of Transportation specifications for shipment of these goods. These items must be taken directly out of the City of Detroit.

IT IS FURTHER ORDERED that, if necessary, a permit for shipping these items shall be issued to Glen Qualls forthwith by the City of Detroit Fire Marshal.

IT IS FURTHER ORDERED that without regard to the requirements of shipping boxes, the following items, permissibly possessed for use in the City of Detroit and State of Michigan, be released to Glen Qualls forthwith:

FUN SNAPS
HAPPINESS CYLINDER
BUTTERFLY FLOWERS
TWO STAGE SPACE JET
BABY MAGIC BLOOMS
TWITTER GLITTER
RED GROUND

GROUND BLOOM FLOWER
TUBE SMOKE
SMOKE BOMBS (ROUND)
MAGIC COLORED SNAKES
JUMBO MAGIC BLACK SNAKES
GLOW WORMS SNAKES
SPRAYING TORCHES W/BALLS
COLOURED AVIATION LAMP

Hon. John H. Hausner /s/
Circuit Court Judge

Approved as to form:
Thomas W. Deinek (P-32987) /s/
Attorney for Detroit Police Department

****HANDWRITTEN****

Stipulations for Licensing Storage and Dismissal of Criminal Matters

1) If Qualls prevails on this issue, and stipulates to strict adherence with the City of Detroit Code, objections to retail licensing will be withdrawn, and the criminal matter pending in 36th District Court will be dismissed.

2) It is further stipulated that no more than 100 lbs. of any fireworks (excluding one retail package of each item for sale and on display) will be stored in this retail location between now and Feb 28, 1983.

3) Wherever practical, the display items will be rendered non viable.

4) If the city prevails, on the question before Judge Hausner, the matter of licensure will be resubmitted to the Consumer Affairs Dept. for a decision based on the hearing held on 6-10-82.

/s/ Attorney for City /s/ Doug Mulkoff, Attorney for Plaintiffs

Separate page, titled "Stipulated Issue: For Judge Hausner" (again HANDWRITTEN)

If Glen Qualls can possess for sale for immediate transportation out of the state of Michigan, or for bona fide religious uses, or for licensed display to be held within 24 hours items admittedly not permitted for sale under the City of Detroit Code.

/s/ Attorney for City /s/ Doug Mulkoff, Attorney for Plaintiffs

STATE OF MICHICAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, and PYROTECHNIQUES, LTD., d/b/a HO LEE KOW FIREWORKS FACTORY, and d/b/.a FIREWORKS UNLI MITED .

Plaintiffs,

vs.

CiTY OF DETROIT,

Defendant.

Honorable John H. Hausner

Civil Action No. 85-515546 CZ

INJUNCTION

At a session of said Court held in the City of Detroit on July 3, 1985.

Plaintiffs' COMPLAINT, MOTION FOR PRELIMINARY INJUNCTION MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION, SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION and exhibits having been filed, responses having

been filed thereto, argument having been, heard thereon, testimony having been taken thereon and the Court having given due consideration to the records, pleadings and arguments of counsel;

The Court finds that as a matter of law, pursuant to MCL 750.243(3)(a)-(g), the PLainttiffs' need no permit to be a retailer who has goods on hand for sale to
the public in a supervised display area and to sell the following items:

a. Flat paper caps containihg not more than .25 of a grain of explosive content per cap, in packages labeled to indicate the maximum explosive content per cap.

b. Toy pistols, toy cannons, toy canes, and toy guns of a type approved by the director of the department of state police in which paper caps as described in subdivision (a) are used and which are so constructed that the hand cannot come in contact with the cap when in place for the explosion and which are not designed to break apart to be separated so as to form a missile by the explosion.

c. Sparklers containing not more than .Ol25-pounds of burning portion per sparkler.

d. Flitter sparklers in paper tubes not exceeding 1/8 inch in diameter, cone fountains, and cylinder foundations.

e. Toy snakes not containing mercury, if packed in cardboard boxes with not more: than 12 pieces per box for retail sale and if the manufacturer's name and the quantity contained in each box are printed thereon and toy smoke devices and trick noise makers.

f. Possession, transportation, sale:, or use of signal flares of a type approved by the director of the department of state police, blank cartridges or blank cartridge pistols specifically for a show or theater, for the training or exhibiting of dogs,for signal purposes in athletic sports, for the use by military organizations, and all item used by railroads,trucks, or vehicles for emergencycy signal purposes.

g. Fireworks, provided they are to be shipped directly out of state in accordance with regulations of the United States department of transportation covering the transportation of explosives and other dangerous articles by motor, rail, and water.

IT IS THEREFORE FURTHER ORDERED that the Defendant City of Detroit is enjoined from interfering with the Plaintiffs' right to store for retail purposes and to sell at retail, in a supervised display area, the aforementioned goods on the premises of the building located at: 817 E. Seven Mile Road, Detroit, Michigan. The aforesaid premises do not include that portion of the structure, which previously was a separate address and is now connected to 817 E. Seven Mile Road, Detroit, Michigan by a fire door.

IT IS FURTHER ORDERED that Plaintiff shall not have more than 100 lbs. net weight (400 lbs. gross weight) on the aforesaid premises, at any one time, for the purposes allowed by this injunction, while this injunction is in effect.

Plaintiffs' request for an injunction beyond that heretofore stated is denied.

IT IS FURTHER ORDERED that Plaintiff make available to Defendant samples of that which he has on hand for retail sale for (sic) in conmformity with

this order.
/s/

JOHN H. HAUSNER
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, and PYROTECHNIQUES, LTD., d/b/a HO LEE KOW FIREWORKS FACTORY, and d/b/a FIREWORKS UNLIMITED,

Plaintiffs,

vs. C.A. 85-515546 CZ
Hon. John H. Hausner

CITY OF DETROIT,

Defendant

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ORDER REGARDING CROSS-COMPLAINTS OF CONTEMPT, DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

At a session of said court held in the Lafayette Building on the twenty-fourth day of June, 1986; Hon. John H. Hausner presiding and it will be Plaintiffs' COMPLAINT, Defendant's ANSWER, CROSS-COMPLAINTS FOR CONTEMPT AND OTHER PAPERS HAVING BEING FILED; evidentiary hearings having been held hereon; expert testimony having been taken; documentary and physical evidence having been admitted; inspection and tests having been conducted; arguments having been held thereon and the court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Defendant's claim of contempt against Plaintiff GLEN QUALLS shall be, and hereby is, dismissed and the Plaintiff GLEN QUALLS shall be, and hereby is, adjudged not guilty of any contempt of this Court's Injunction of July 3, 1985 for the reasons set forth in the Court's opinion entered on the record from the bench on June 23, 1986.

IT IS FURTHER ORDERED that Plaintiffs' complaint of contempt again st Defendant CITY OF DETROIT shall be, and hereby is upheld and a Judgment of contempt shall, and hereby does issue against Defendant CITY OF DETROIT for violation of this Court's Injunction of July 3, 1985 for the reasons set forth in the Court's opinion entered on the record from

the bench on June 23, 1986 and in the following specific respects:

1. Defendant CITY OF DETROIT sent employees and agents to observe, inspect, monitor and regulate Plaintiffs' business from and after July 3, 1985, which employees, representatives and agents were not informed of this Court's Injunction of July 3, 1985, did not know its meaning and did not understand that they were bound by said Injunction.

2. Defendant CITY OF DETROIT, with the advice of counsel,specifically violated said Injunction of July 3, 1985 by interfering with the selling of fireworks which are unrestricted for use in Michigan pursuant to MCLA 750.243a(3)(a-f)

3. Defendant CITY OF DETROIT, with the advice of counsel, specifically violated said Injunction of July3, 1985 by interfering with the selling of fireworks which restricted for use in Michigan pursuant to MCLA 750.243 a (3)(g), (handwritten addendum) but can be sold in Michigan to be shipped directly out of state for use.

4. Defendant CITY OF DETROIT, through Fire Marshal Donald Robinson acted in contempt of this Court's Injunction of July 3, 1985 by utilizing his "summary abatement" powers to completely shut down Plaintiffs' business at or about 7:00 pm on the evening of July 3, 1985.

5. Defendant CITY OF DETROIT, through its police department, specifically violated this Court's Injunction of July 3, 1985 by completely shutting down Plaintiffs' business at or about 3:00 pm on July 4, 1985 on the grounds that said business was a "public nuisance".

IT IS FURTHER ORDERED that Defendant CITY OF DETROIT shall pay a fine of $250.00 per day from and including

July 3, 1985 until and including July 8, 1985.

IT IS FURTHER ORDERED that Defendant CITY OF DETROIT shall pay Plaintiffs' actual attorney's fees and costs for all proceedings required by DEFENDANT'S Contempt to date and such other proceedings as may be required in the future'said actual attorney's fees and costs to be determined by evidentiary hearing commencing on June 24, 1986.

IT IS FURTHER ORDERED that Plaintiff shall have the following declararatory relief:

1. Fcr the reasons set forth on the record and the Court's opinion of June 23, 1986, the CITY OF DETROIT Fireworks Ordinance, chapter 23 ordinance 314H, article 4, sections 23-4-1 through 23-4-9 shall be, and hereby is declared invalid as to the retail sale of fireworks within the CITY OF DETROIT because it conflicts in all of its essential parts with either state law, federal law and regulation and national safety standards.

2. It is hereby declared that retailers may sell to consumers items for direct shipment and use out of state pursuant to MCLA 7.50.243A(3)(g), (Handwritten addendum) and that said merchandise under 1000 lbs for use out of state does not require special packaging by the seller.

IT IS FURTHER ORDERED that the Court finds that as a matter of law, pursuant to MCLA 750.243(3)(a-g), the Plaintiffs need no permit to be a retailer who has goods on hand for sale to the public in a supervised display area and to sell the following items:

a. Flat paper caps containing not more than .25 of a grain of explosive content per cap, in packages labeled to indicate the

maximum explosive content per cap.

b. Toy pistols, toy cannons, toy canes, and toy guns of a type approved by the director of the department of state police in which paper caps as described in subdivision (a) are used and which are so constructed that the hand cannot come in contact with the cap when in place for the explosion and which are not designed to break apart to be separated so as to form a missile by the explosion.

c. Sparklers containing not more than .0125 pounds of burning portion per sparkler.

d. Flitter sparklers in paper tubes not exceeding 1/8 inch in diameter, cone fountains, and cylinder fountains.

e. Toy snakes not containing mercury, if packed in cardboard boxes with not more than 12 pieces per box for retail sale and if the manufacturer's name and the quantity contained in each box are printed thereon; and toy smoke devices and trick noise makers.

f. Possession, transportation, sale, or use of signal flares of a type approved by the director of the department of state police, blank cartridges or blank cartridge pistols specifically for a show or theater, for the training or exhibiting of dogs, for signal purposes in athletic sports, for the use by military organzations, and items used by railroads, trucks, or vehicles for emergency signal purposes.

g. Fireworks, provided they are to be shipped directly out of state in accordance with regulations of the United States department of transportation covering the transportation of explosives and other dangerous articles by motor, rail, and water.

IT IS FURTHER ORDERED that Defendant CITY OF DETROIT is enjoined from interfering with the Plaintiffs' right to store 1,000 pounds gross weight for retail purposes any Class C common firework or to sell at retail; from a supervised display area the aforementioned goods on the premises of the building

located at 817 E. Seven Mile Road, Detroit, Michigan.

IT IS FURTHER ORDERED that Defendant **CITY OF DETROIT shall provide to every official, employee, representative or agent who shall have reason to come or be in contact with Plaintiffs' business** at the above address **or who shall be involved in any decision making process regarding said business shall be specifically provided with a copy of this Injunction and specifically informed that any violation** of this Injunction will subject said official, employee, representative or agent of Defendant CITY OF DETROIT to **imprisonment and/or fine**.(emph. added)

IT IS FURTHER ORDERED that Defendant CITY OF DETROIT, by and through its officials, employees, representatives or agents shall not in any fashion restrict ingress or, egress or access to Plaintiffs' business at 817 E. Seven Mile Road in said city by either vehicular or pedestrian traffic; provided that Defendant city may engage in ordinary traffic control in such a fashion as to maximize access to said business and the flow of related traffic.

(Handwritten addendum) It is further ordered that Defendant City of Detroit shall return forthwith to the Plaintiff all items seized from the Plaintiff's premises on July 3, 1985 and July 4, 1985.

/s/ John H. Hausner
Circuit Judge signed 11:45 a.m. June 24, 1986

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT FOR THE COUNTY OF WAYNE

GLEN QUALLS, ET AL.,

v. **Plaintiff.** **No. 85-515-546-CZ**

CITY OF DETROIT, ET AL.,

Defendants.

_____/

PROCEEDINGS HAD BEFORE THE HONORABLE LOUIS F. SIMMONS, JR., a Judge of the Third Judicial Circuit of Michigan at 1921 City-County Building, Two Woodward Avenue, Detroit, Michigan 48226, on Wednesday, August 5, 1992.
APPEARANCES:

HUGH M. DAVIS, ESQ.,
Attorney at Law,
Appearing on behalf of the Plaintiff.

DAVID L. ROSE, ESQ.,
Attorney at Law,
Appearing on behalf of the Defendant

EVIDENTIARY HEARING VOLUME IV

****SELECTED TESTIMONY**, ESTHER SHAPIRO, Director of Licensing, Detroit Consumer Affairs Division**

REPORTED BY: Jeffrey L. Jones, CSMR 0109, Official Court Reporter.

Begin Transcript, page 56 (hereinafter TR-56)

Q. (By Mr. Davis) I've obtained a copy of a document which purports to be from your department dated 7/14/92, setting forth the applicable license fees – that's the application fee and the license fee turn out to be the same thing?

A. Yes.

Q. And the effective date is July 13, 1992, right?

A. That's right.

Q. For a sports stadium it says $656.00?

A. Yes.

Q. Would that be like Tiger Stadium?

A. That's right.

Q. Joe Louis Arena?

A. Yes.

Q. For a – more than a 500 room hotel, the license fee is $690.00?

A. If that's on the schedule. I don't know every single fee without checking the roster.

Q. I understand, but –

A. If it's on that roster, then those are the fees that are currently being charged, yes.

Q. And those fees are arrived at by the same method of calculation?

A. That's right.

End TR-56

Begin TR-69

Q. (By Mr. Rose) Were there any situations that you know of where your recommendation was significantly higher than his?

A. No.

Q. Okay, and for fireworks the $250.00 was sort of a rounding off of the –

A. We rounded all of these off, yes.

Q. Directing your attention, Mrs. Shapiro, to some of the handwritten pages that are down below. Can you tell us – I'm not sure that you can even read it. See if you can read it and then see if you can tell us what is indicated. Perhaps you could show – well, just tell us what it is first.

A. Well, for example, the appendix is called "cost computation for the consumer affairs department related to licensing". Then it's broken down into clerical costs, overhead costs, total costs, computations as well as his notes.

End TR-69

Begin TR-70

A. (continued from TR-69) Would you like me to be more specific about this?

Q. Yes.

A. For example, under "clerical costs", he had the approximately 1981 wage rate. For a senior clerk it was $19,808.00. For a principle clerk; $21,896.00. Then fringe benefits – you don't want me to read all these figures, do you?

Q. No, you don't need to read them, but if you can give the Court a summary of what is on there so that the Court and — will have the benefit of the kind of analysis that was done.

A. All right. On this first one he went into the actual personnel costs of the department; the senior clerks, principle clerks and so forth, benefits, overhead costs, officer supplies, other administrations. For example, the license and permits investigators, the other employees who were responsible for paperwork and other administrative work effective only to the general license bureau division of the department. The ratio of overhead to direct clerical costs, so that the total costs per clerk came to $41,000.00 a year.

He also factored out the average productive hours per year; working out the cost per hour and broke that down to the average cost per minute of each clerk

End TR-70

Begin TR-71

A. (continued from TR-70) or worker's time. Then, in his notes he said that, 'The data display costs are based upon a recent study conducted by W. Palmer of the budget department, that only the wage and benefit rates have been updated and the overhead costs were not considered in a prior study. He also went into things like the petition costs of verifying petitions for zoning variances are also part of my department's responsibility. All of that is included here.

Q. All right, and then did he do the same kind of analysis for the other departments that are involved in approving licenses?

A. In some cases, yes. For example, he did cost computations for police officers, for other departments – for one or two departments where there was not as direct a connection with the department. He did kind of a rough estimation based upon the earlier studies of other departments. So he does have a breakdown here of police department costs, of building and safety engineering costs not met by their licensing structure at that time – debt management cost, debt management verifies, insurance and other requirements of – that we have and so forth though the who city apparatus.

Q. And then he tried to identify those functions that were

End TR-71

Begin TR-72

Q. (continued from TR-71) applicable to fireworks and those that were applicable to other kinds of business?

A. In each licensing case, yes. He related it to the specific license.

MR. ROSE: I'd like to offer this into evidence.

MR. DAVIS: No objection.

THE COURT: There being no objection then, **Defendant's Proposed Exhibit Number 32 may be admitted.** I understand, Mr. Davis, that you've never seen this before?

MR. DAVIS: I'm not (sic) Your Honor –

THE COURT: It may be admitted.

MR. ROSE: Your Honor, neither the 31 nor 32 has been copied for the reason I indicated in my objection.

MR. DAVIS: I'm certain I'll get a copy of it, Judge.

MR. ROSE: We'll get a copy –

THE COURT: All right –

MR. ROSE: Your Honor –

THE COURT: Okay, 31 and 32 both have been

End TR-72

Begin TR-73

THE COURT: (continued from TR-72) admitted?

MR. ROSE: Yes.

MR. DAVIS: Yes.

MR. ROSE: I'm just going to ask – I will, at the end of the day, ask leave to withdraw them so we can copy them and give them to Counsel. If I may hand the Court the Exhibit – just one Exhibit?

THE COURT: Yes, okay. This is 32?

MR. ROSE: Yes, sir.

THE COURT: Okay.

MR. ROSE: Does the Court wish to have 31 as well; the ordinance itself?

THE COURT: I can – I – (proffering).

MR. ROSE: Thank you, Your Honor.

THE COURT: Mr. Davis, you are aware – you have seen 31 before?

MR. DAVIS: The ordinance?

THE COURT: The ordinance.

MR. DAVIS: Yes, sir.

THE COURT: Okay.

MR. DAVIS: And I thought we also marked, did we not, the list of fireworks dealers?

MR. ROSE: I will do that. I have not done that.

MR. DAVIS: There will be not problem with the

End TR-73

Begin TR-74

MR. DAVIS: (continued from TR-73) Exhibits, Judge. There are a couple of other ones.

MR. ROSE: Thank you, Your Honor.

Q. (By Mr. Rose) Mrs. Shapiro, could we – how would you describe the study done by Wayne State University to produce the costs? Was it relatively precise and scientific or is it the other end of the scale?

A. It was exhaustive. He said – I think he was going to do a kind of a look over in two or three weeks. He spent a couple of months in the department and then went after other departments. I've never seen anything – well, I'm not familiar with this kind of thing, that's why I asked for help, but he just went into things the rest of us had never thought of. It was exhaustive and brilliant.

Q. Was there a public hearing at the time of the submission of the first set of license fee recommendations made by you after the adoption of the ordinance in 1982?

A. You mean when it was presented to the Council?

Q. Yes.

A. Yes, there would have had to have been, and the professor came down and testified.

Q. And was there testimony in opposition to some of the fee increases?

A. Not that I can remember. Although it was publicly

End TR-74

Begin TR-75

A. (continued from TR-74) posted, I don't remember anyone coming down and speaking against it – not at the council level.

Q. Before the council?

A. Not before the council, that I can remember.

Q. I'm not asking just about fireworks not, I'm asking about any of –

A. All the license fees.

Q. Okay. In 1982, your recollection is that there was no opposition to the increase?

A. I don't remember that there was any at the council hearing, no.

Q. Was there any other kind of opposition?

A. Well, obviously in my field, whenever there's a raise in price, someone objects. Yes, we had some problems with people – you know, saying that they didn't like a higher price. That's to be expected.

Q. In 1982 do you recall anybody objecting to the increase in the fee for retail fireworks dealers?

A. No, none at all.

Q. Mrs. Shapiro, I think you indicated before in response to a question from Mr. Davis that the fee for fireworks dealers was either the highest or one of the highest?

A. Yes.

Q. Did you testify that it was the highest?

A. It's – I think it's the highest on the roster, but if

End TR-75

Begin TR-76

A. (continued from TR-75) you looked at costs to some other businesses, they could conceivably pay more. For example, restaurant's fees are based on occupancy. They also need a twice yearly – by state law need a twice yearly health department inspection and there's a fee for that. There might be other inspections that they would pay for so that, while the fee on the schedule would be a certain amount, they could conceivably go over the $1,000.00 in terms of other inspections and costs.

Q. Are you familiar with the fee on hall/taxi dance?

A. Oh, I'd forgotten that. That one's very high.

Q. That's in fact the same as the one – according to this estimate –

A. Yes.

Q. -- $1,150.00, just like the fireworks?

A. That's right.

End TR-76

Begin TR-81

Q. (By Mr. Davis) If I might, Miss Shapiro, regarding the reduction of fees on businesses that were considered to be

socially necessary in certain categories – you recall that testimony, right?

A. Yes.

Q. You've testified in this matter, have you not that, at least from your prospective, fireworks have no redeeming social value?

A. It can be interpreted that way. I wouldn't agree with that completely.

Q. You would?

End TR-81

Begin TR-82

A. No. May I qualify that?

Q. Well, do you recall whether or not that's what you said at your deposition?

A. I said that as a general statement. We do narrow it down to one category.

Q. Which was what?

A. Fireworks. Would you like me to elaborate on that?

Q. No.

A. Because there is an area in which it does have a redeeming social factor.

Q. Public displays?

A. That's right – carefully controlled.

Q. Retail fireworks used by individual persons of the Public, be they over 18, under 18 and regardless of what kind of fireworks devices used from the prospective of you as the consumer affairs department, they have no redeeming social value?

A. I would not consider that as necessary as a grocery store.

Q. I'm sorry?

A. I would not consider that as essential as a grocery store.

End TR-82

(Below certification appears on TR-90).

I, Jeffrey L. Jones, do hereby certify that this transcript, as herein before set forth, does constitute a true, complete and accurate record of the proceedings had in the above-entitled cause August 5, 1992.

/s/
Jeffrey L. Jones, CSMR 0109

Detroit Code -- Chapter 30

LICENSES

§ 30-1-1.	Application of article generally
§ 30-1-2.	Separate license required for each place of business
§ 30-1-3.	Change of location
§ 30-1-4.	Advertising prior to obtaining license
§ 30-1-5.	False statements in applications
§ 30-1-6.	Signatures; form; records to be kept
§ 30-1-7.	Age qualifications of applicant
§ 30-1-8.	Payment of taxes prerequisite to issuance
§ 30-1-9.	Term
§ 30-1-10.	Prorating of license fees; fees to accompany applications
§ 30-1-11.	Display
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§ 30-1-15.	Inspection of premises
§ 30-1-16.	Denial, suspension and revocation—Generally
§ 30-1-17.	Same—Procedures
§ 30-1-17.5.	Request for revocation of liquor licenses
§ 30-1-18.	Application fee and renewal date schedule to be set by director, approved by council

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Sec. 30-1-1. Application of article generally.

(a) Notwithstanding any other provisions of this Code or other ordinances of the city the provisions of this chapter shall be applicable to and controlling of the issuance, refusal, revocation and suspension of all licenses for any establishment, trade, business or occupation regulated by this Code or any ordinance of the city.

(b) If any other provision of this Code is or appears to be in conflict with or contradictory to the provisions of this chapter, the provisions of this chapter shall be controlling.

(c) This chapter shall be supplementary to other licensing provisions. (Code 1964, § 31-1-10)

Sec. 30-1-2. Separate license required for each place of business.

A license under this chapter shall be secured for each office or location wherein the licensee does business, except for businesses which by their very nature do not have fixed locations. No license issued under this chapter shall authorize the licensee to do business except from the location stipulated in the license.

Sec. 30-1-3. Change of location.

Notice in writing shall be given to the consumer affairs department of any change of business location by any licensee under this article, whereupon the department shall issue a new license for the unexpired period for the new location without additional charge. Any change of business location, without notification to the department and issuance of a new license, shall automatically cancel all licenses theretofore issued.

Sec. 30-1-4. Advertising prior to obtaining license.

No person, whether principal or agent, shall, by circular, handbill, newspaper or in any manner, advertise his business before the proper license is issued and he has complied with the other licensing provisions.

Sec. 30-1-5. False statements in applications.

No person shall make any false statement in his application for a license.

Sec. 30-1-6. Signatures; form; records to be kept.

(a) All licenses issued under this Code or any other resolution or ordinance of the city council shall be signed by the director of the consumer affairs department and countersigned by the clerk of the city.

(b) The consumer affairs department shall maintain such records of license issuance and transfers as are consistent with good accounting purposes.

(c) The license form shall be designated by the consumer affairs department and shall have the approval of the finance director and the corporation counsel. (Code 1964, § 31-1-5)

Sec. 30-1-7. Age qualifications of applicant.

All applicants for a license under this chapter must be at least eighteen (18) years of age.

Sec. 30-1-8. Payment of taxes prerequisite to issuance.

No license under this chapter shall be issued to any applicant owing any taxes to the city.

Sec. 30-1-9. Term.

In all cases, unless otherwise provided, where, by this Code or other ordinance or resolution of the city council, a sum of money is fixed for the payment of a license, it shall be understood to be for

the period of one year, except as otherwise provided in section 30-1-10. (Code 1964, § 31-1-1)

Sec. 30-1-10. Prorating of license fees; fees to accompany application.

When the period for which a license may be issued is less than six (6) months and the fee for the license exceeds twenty-five dollars ($25.00), the consumer affairs department may, for good cause shown, issue a license upon payment of one-half the fee. On all applications for a license, the fee provided must accompany the application. The amount required to be paid for any license shall by paid to and collected by the consumer affairs department and a receipt of such collection shall be given to the applicant as evidence of the payment of the same. (Code 1964, § 31-1-2)

Sec. 30-1-11. Display.

Every license issued under this Code or any other ordinance of the city shall be prominently displayed in a conspicuous place on the licensed premises or vehicle or carried upon the person where there is no licensed premises or vehicle by the license. (Code 1964, § 31-1-6)

Sec. 30-1-12. Replacement of lost certificates or plates.

Except as otherwise provided in this Code, duplicate license certificates or license plates may be issued after proof of loss of the original and the payment of a fee of two dollars ($2.00). (Code 1964, § 31-1-2.1)

Sec. 30-1-13. Transferability.

It shall be unlawful for any licensee under this Code to allow another person to use his license or to transfer or assign his license, without written authorization by the consumer affairs department;

payment of a prescribed transfer fee to be determined by such department and, whenever required by this Code, the execution of a bond to the city by the transferee. If the licensee is a corporation, any change of management or any sale of stock which would vest control of the corporation in persons other than those designated on the license application as persons controlling the operation of the business, shall be deemed to be a transfer of a license. The above prohibition shall not be construed to preclude the use of the licensee's premises by an unlicensed person; provided, that such use is subject to the supervision and control of the licensee. (Code 1964, § 31-1-3)

Sec. 30-1-14. Renewal.

The consumer affairs department shall send a list of all licenses that require renewal to the interested city departments, four (4) months prior to the expiration date of the licenses. Unless the interested city departments notify the consumer affairs department of an existing violation at least fifteen (15) days prior to the expiration of the licenses, the licenses will be renewed. (Code 1964, § 31-1-8)

Sec. 30-1-15. Inspection of premises.

(a) Every establishment which is ostensibly being operated as a business which is subject to regulation under this Code shall be open for inspection by duly authorized representatives of any city department concerned with the licensing or supervising of such establishment during operating hours for the purpose of enforcing any laws of the state or any ordinances or regulations of the city relating to the public health, safety or welfare.

(b) No license shall be issued for the establishment or operation of any business regulated by this Code until inspections have been made as required by the applicable laws and regulations of the city and state and approvals obtained from the various city departments

regulating the maintenance, use, operation, location and health and sanitary conditions of the premises.

(c) It shall be unlawful for any person ostensibly exercising control over the premises in which a regulated business is being operated, to refuse entry by duly authorized city representatives for the purpose of making lawful inspections. (Code 1964, § 31-1-9)

Sec. 30-1-16. Denial, suspension and revocation—Generally.

(a) The consumer affairs department is authorized to issue, deny, revoke or suspend a license for any establishment, trade business or occupation regulated by this Code or other city ordinance; except, that the buildings and safety engineering department shall continue to issue, deny, revoke or suspend licenses for those occupations which require certification of competency based upon an examination of the applicant's knowledge of various Code requirements and technical skills relating to the installation, erection, alteration or repair of structures or equipment under the jurisdiction of that department. The consumer affairs department may delegate to the buildings and safety engineering department the authority to issue, deny, revoke or suspend any business or contractor's license which would permit a person, certified as to technical qualifications as described above, to enter into any performance or services contract.

(b) A license may be denied, revoked or suspended for any of the following reasons:

(1) Upon proof submitted to the consumer affairs department of any of the following acts committed by an applicant or licensee or, if the applicant or licensee is a corporation or partnership, by the entity itself or by any of the persons in a position of control or management of the business including but not limited to the officers, directors, controlling stockholders or managing employees or by a corporation or partnership of

which the applicant or licensee was in a position of control or management or by any agent or employee of the applicant or licensee, who is in a position of management or control of the business to be licensed:

a. The violation of any state statute or any ordinance of the city regulating, controlling, or in any way relating to the location, construction, maintenance, use, qualification for or operation of an establishment, trade, business or occupation similar to or the same as that for which a license is being considered, or engaging in an illegal, unfair, dishonest, deceitful or fraudulent business practice, which evidences a willful and deliberate disregard for the health, safety or welfare of either the patrons, employees or persons residing or doing business nearby, or competing businesses;
b. Engaging in the same or a similar trade, business or occupation for which a license is required without first having obtained such license or, having obtained a license, engaging in the same or similar trade, business or occupation during the period of suspension or after revocation;
c. Allowing another person to use one's license without first having obtained the necessary approval of transfer, as required by section 30-1-13; or
d. Making any false, misleading or fraudulent statement of fact in the license application or in any document required by the city in conjunction therewith.

(2) Upon proof submitted to the consumer affairs department that the establishment, trade, business or occupation for which an application for license is pending or, for which a license has been issued:

a. Constitutes a public nuisance;

b. Creates traffic or parking problems which adversely affect the rights of the neighboring community to the peaceful enjoyment and use of their property;

c. Is used for or admits persons who use the establishment, trade, business or occupation as their base of operations for:
   1. Gambling;
   2. Prostitution;
   3. The illegal sale or use of narcotics; or
   4. The dissemination of pornographic material or the presentation of pornographic performances with the actual or constructive knowledge of the applicant or licensee; or

d. That the establishment, trade, business or occupation sought to be licensed constitutes a hazard or threat to the peace, health, safety or welfare of the people of the city. (Code 1964, § 31-1-4)

Case law annotations—Standard for license revocation stated as "violation of a city ordinance" satisfies due process; *Tally v. Detroit*, 58 Mich. App. 261, 227 N.W.2d 214 (Div. 1, 1975). Due process requires notice and hearing prior to revocation or failure to renew, once timely application for renewal is made for a license; *Detroit v. Mashlakjian*, 15 Mich. App. 236, 166 N.W.2d 493 (Div. 1, 1968).

Sec. 30-1-17. Same—Procedures.

(a) The consumer affairs department shall deny an application for a license by giving written notice to the applicant and setting forth therein the reasons for such denial. Any applicant aggrieved by the denial of a license shall be entitled to a hearing before the director of the consumer affairs department or his designee. Application for such hearing shall be addressed to the director of the consumer affairs department, in writing and must be made within thirty (30) days of the mailing of the notice of denial. Such hearing shall be scheduled at the earliest possible date, but not later than thirty (30) days after the receipt of the application for a hearing. The

applicant and interested city departments shall be notified of the hearing by the director at least four (4) days prior to the hearing. The hearing may be adjourned only by stipulation of the parties or, upon cause shown, by order of the director.

(b) When the consumer affairs department is presented with evidence which shows that probable cause exists to suspend or revoke a license, the department shall notify the licensee in writing of its intent to suspend or revoke the license specifying the reasons therefor and directing the licensee to show cause at a hearing before the director of the consumer affairs department or his designee why the license should not be suspended or revoked. The notice shall include the date, time and place for the show cause hearing which shall be scheduled not less than four (4) days from the date of service of notice.

(c) If there is an immediate threat to the public health, safety and welfare, the license shall be suspended immediately and the licensee shall be notified by registered mail, and in person, if possible, specifying the reasons for the emergency suspension, and scheduling a show cause hearing within thirty (30) days. Upon application in writing to the consumer affairs department, the licensee shall be entitled to a hearing within forty-eight (48) hours in order to ascertain whether emergency suspension shall continue.

(d) The licensee shall be given an opportunity at his show cause hearing to present reasons justifying his right to continue as a licensee and the department having jurisdiction over the occupation or business of such licensee shall be given an opportunity to present reasons justifying such suspension or revocation.

(e) If the licensee fails to appear and show cause why his license should not be suspended or revoked, the license shall be revoked effective at the end of the business day on which the show cause hearing was regularly scheduled.

(f) The consumer affairs department shall deny an application for a license, or suspend or revoke a license, by giving written notice to the applicant or licensee and setting forth therein the reasons for such denial, suspension or revocation.

(g) Notice provided for in this chapter shall be sent by registered mail to the applicant or licensee at the address on record with the consumer affairs department or to the last known address. (Code 1964, § 31-1-4.1)

Sec. 30-1-17.5 Request for revocation of liquor licenses.

(a) For the purposes of this section, the following words and phrases shall have the meanings respectively ascribed to them by this subsection:

(1) "Establishment" or "liquor establishment" shall mean a place located within the city and owned and/or operated by a licensee (as defined) from which beer and wine or spirits are sold for consumption on the premises.

(2) "License" or "liquor license" shall mean a license to sell beer and wine or spirits for consumption on the premises granted and issued by the state liquor control commission.

(3) "Licensee" shall mean the legal holder of a license (as defined).

(b) After due notice and proper hearing, the city council may, pursuant to Section 17 of Public Act No. 8 of 1933 as amended [MCL 436.17, MSA 18.988], by resolution, request the state liquor control commission to revoke any liquor license held by any licensee who owns or operates a liquor establishment within the city.

(c) A request by the city council made under subsection (b) may be made to the state liquor control commission when any of the following circumstances exist:

(1) Upon a finding by the city council that any of the following acts have been done by the licensee or an agent or employee of the licensee or other person with the actual, implied or apparent authorization or consent or knowledge of the licensee or, if the licensee is a corporation or partnership, the entity itself or any of the persons in a position of control or management of the business including but not limited to the officers, directors, controlling stockholders or managing employees; or a corporation or partnership of which the licensee was in a position of control or management:

a. Violated any city ordinance, state statute, rule or regulation of the state liquor control commission that regulates or controls the location, construction, maintenance, use or operation of the liquor establishment; or

b. Owned or operated a liquor establishment without first having obtained a license or, having obtained a license, owned or operated such establishment during a period of suspension of that license or after revocation of that license;

c. Made any materially false or misleading statement of fact in the license application, renewal application or other document required by the state liquor control commission, or in any document required by the city for operation of a liquor establishment; or

d. Allowed the use of the establishment during the twelve (12) months receipt of the petition for license revocation for:

1. Illegal gambling;

2. Prostitution, accosting and/or soliciting for purposes of prostitution;

3. The illegal manufacture, sale or use of controlled substances; or

4. Other illegal activity.

(2) Upon a finding by the city council that the liquor establishment or the surrounding premises under the control of the licensee:

a. Constitutes a public nuisance as declared by statute; or

b. During the twelve (12) months preceding receipt of the petition for license revocation has been the scene of repeated arrests for, and has continued to be used, despite repeated notices of the arrests and repeated notices to correct the situation, for:

1. Illegal gambling;

2. Prostitution, accosting and/or soliciting for purposes of prostitution;

3. The illegal manufacture, sale or use of controlled substances; or

4. Other criminal activity.

(d) The city council may hold the public hearing to consider whether or not to request the state liquor control commission to revoke any license for any reasons found in subsection (c) when the following procedures have been met:

(1) The city council has received, through its committee clerk, a petition requesting the hearing to determine whether a request

shall be made to the state liquor control commission to revoke the license; provided that the petition shall have been received within thirty (30) days of any act, violation or condition described in subsection (c);

(2) The city council has forwarded the petition to the corporation counsel for review and has received from the corporation counsel a recommendation to proceed with the hearing;

(3) The city council has acted upon that recommendation by appointing a fact finding officer to conduct hearings to determine whether or not there are sufficient facts as required under subsection (c) to justify a request to the state liquor control commission to revoke the liquor license, and

(4) The city council has received the record and the proposal for decision from the hearing officer.

(e) The notice provided for in this section shall be in writing and shall be sent by registered mail, return receipt requested, to the licensee at the last known address on record with the state liquor control commission and to the licensee's liquor establishment. The date of service shall be the date the notice is mailed. The notice shall inform the licensee of the city council's intent to hold a hearing to determine whether the state liquor control commission will be requested to revoke the licensee's license pursuant to Section 17 of Public Act No. 8 of 1933 as amended [MCL 436.17, MSA 18.988], shall detail the reason or reasons on which the proposed request for revocation would be based and shall indicate the date, time and location of the hearing. The notice shall also inform the licensee of his or her right to be represented by counsel and to defend by confronting any adverse witnesses and by being allowed to present witnesses, evidence and arguments pursuant to the rules and order of business of the city council. The hearing shall be scheduled not less than thirty (30) days and not more than forty-five (45) days from the date of service, provided that

adjournments of the hearing for good cause shown may be granted by the city council at the request of the licensee or the corporation counsel or upon the city council's own motion, pursuant to rules and order of business of the city council.

(f) If a petition for a license revocation request hearing is granted by the city council, the council hearing and the fact finding hearing shall be conducted according to procedures set forth in the rules of the city council adopted in accordance with the Charter.

(g) When the city council resolves to request that the state liquor control commission revoke a liquor license pursuant to this section, the city clerk shall promptly forward to the state liquor control commission and to the licensee certified copies of:

(1) The resolution requesting revocation of the liquor license;

(2) A statement of the findings of the city council on which the resolution is based; and

(3) The hearing notice. (Ord. No. 387-H, § 1, 3-19-80)

§ 19-3-69. Permit for transportation
§ 19-3-70. Storage of fireworks

Sec. 19-3-69 Permit for transportation.

(a) *Required.* It shall be unlawful for any person to transport fireworks, firecrackers, sparklers or other pyrotechnics or other explosives of like character upon the streets or highways of the city without first obtaining a permit therefor from the fire marshal of the city.

(b) *Application.* The fire marshal is hereby authorized to issue a permit for the transporting of fireworks, firecrackers, sparklers or other pyrotechnics or other explosives of like character, upon the payment of the required fee and upon the filing of an application, in writing, which application shall describe the fireworks, firecrackers, sparklers or other pyrotechnics or other explosives of like character, to be transported, the place of manufacture of such fireworks, the place in the city from which such fireworks are taken and the place to which such fireworks are taken to, the description of the vehicle used for transportation and the name and address of the person in charge of such transporting, and shall contain a further provision agreeing to make use of such fireworks in accordance with the statutes of the state, this article and other ordinances of the city.

(c) *Transportation of fireworks.* The transportation of fireworks within the city shall meet the requirements stated in Chapter 5 of Pamphlet 44A (Manufacture, Transportation and Storage of Fireworks) of the National Fire Protection Association.

Exception: The transportation of less than one hundred (100) pounds are exempt from the requirements of this section.

(d) *Applicability.* Nothing contained in this section with respect to the transporting of fireworks, firecrackers, sparklers or other pyrotechnics shall apply to any retail seller, wholesale dealer or jobber who sells any fireworks, firecrackers, sparklers or other pyrotechnics for delivery and sale or use of the same outside sparklers or other pyrotechnics for delivery and sale or use of the same outside the city, provided they are to be shipped directly out of state in accordance with regulations of the United States Department of Transportation covering the transportation of explosives and other dangerous articles by motor, rail and water. (Ord. No. 314-H, § 1(23-4-8), 2-28-79)

Sec. 19-3-70. Storage of fireworks.

(a) *Permit required fee.* Storage of fireworks allowed to be sold under this division shall be allowed only after the issuance of a permit indicating that the place of storage is approved by the fire marshal.

(b) *Retail Sales.* The storage of fireworks in a place of retail sales shall be limited to a gross weight of less than one hundred (100) pounds and shall be store in a Type 2 Indoor Magazine. Places of storage other than retail sales shall meet the minimum requirements of Pamphlet 44A (Manufacture, Transportation and Storage of Fireworks) of the National Fire Protection Association. Percent of the permitted storage amount in a place of retail sales shall be on display. All fireworks in places of retail sales shall be returned to the magazine at the end of the business day.

Exception: The storage of those items described in section 19-3-64(a)(1) and (a)(8) are exempt from the requirements of this section.

*Type 2 indoor magazine:

(1) An indoor type 2 magazine shall be provided with substantial wheels or casters to facilitate removal from a building in an emergency. The cover for the magazine shall have substantial strap hinges and a means for locking. The magazine shall be kept locked except during the placement or removal of explosive materials with one five (5) tumbler padlock or equivalent.

(2) Type 2 indoor magazines shall be painted red and shall bear lettering in white, on top, at least three (3) inches high, "Explosives—Keep Fire Away."

(3) Type 2 indoor magazines constructed of wood shall have sides, bottoms, and covers or doors constructed of two (2) inch hardwood and shall be well braced at corners. The magazines shall be covered with sheet metal of not less than twenty (20) gauge. Nails exposed to the interior of such magazines shall be countersunk.

(4) Type 2 indoor magazines constructed of metal shall have sides, bottoms, and covers or doors constructed of twelve (12) gauge metal and shall be lined inside with a nonsparking material. Edges of metal covers shall overlap sides at least one inch. (Ord. No. 314-H, § 1(23-4-9), 2-28-79)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GLEN QUALLS, LETICIA QUALLS and ELIZABETH QUALLS,

Case No. 94-420312-CZ

Plaintiff,

-v- **Honorable Michael L. Stacey**

CITY OF DETROIT, DONALD L. ROBINSON, RAYO BAKER, RICHARD LANG, WILLIAM SNEED, ROBERT P. MICHALAK, GERALD CURLEY, DAVID VANN, GLENN WATSON, SANDRA SLAYTON, DONALD BLOOM, SETH DOYLE, O. WILSON, WILLIAM MARTIN and SARGEANT W. STEPHENSON,

Defendants.

_____/

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

_____/

OPINION

This case is an action for damages. It continues nearly fifteen

years of litigation between the principal plaintiff, Glen Qualls and the defendants, the City of Detroit and its various police and fire officers. In this round plaintiffs again challenge various actions by the defendants to enforce the City's fireworks ordinance.

The case is presently before the Court on defendants' motion for summary disposition. Two of the grounds relied on, namely that much of the instant case is either the subject matter of a prior lawsuit or barred by the statute of limitations will be addressed initially since this resolution greatly clarifies what is at issue in the case at bar.

MCR 2.116(C)(7) permits summary disposition when, the "claim is barred because of ... statute of limitations."

In the instant case plaintiffs' claims all involve either common law tort theories or alleged violations of federal or state constitutional rights. The defendants contend -- and there is no objection on this point from the plaintiffs, that these claims are subject to a three-year period of limitations as provided by MCL 600.5805(8). Defendants further contend that the incidents covered in the allegations of the amended complaint, paragraphs 21-124 all involve those that arose more than three years before the amended complaint was served on the City on August 18, 1994. Plaintiffs counter by arguing that these incidents are actionable under a continuing violation theory, or in any event constitute evidence that those claims that are not time-barred are based on acts which constitute a policy, practice or custom of the City.

In the case at bar an examination of the amended complaint shows that paragraphs 26-119[1] all relate to incidents that clearly occurred outside the three-year period of limitations, the last event of which allegedly happened in July 4, 1990. The Court finds that these are time barred. In doing so the Court rejects the plaintiffs' argument that they are actionable under a continuing theory of liability. This Court adopts the reasoning of Judge Louis Simmons,

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[1]The first 25 paragraphs are introductory or general in nature. By themselves they state no claim.

Jr. as expressed in a July 7, 1992 Opinion, p 6 in *Qualls, et al* v *City of Detroit, et al*, Case No. 92-206766-N1:

> Defendants initially assert that the statute of limitations bars part of plaintiff's claim which is based on acts which occurred prior to March 6, 1989. They rely on the 3-year period of limitations found in MCL 600.5806(8). Notably, however, the complaint alleges that all of the acts of the defendants were part of a series of continuing wrongs.
>
> *In Defnet* v *City of Detroit*, 327 Mich 254, 258 (1950) the Court stated
>
> > Where there are continuing wrongful acts within the period limited by the statute . . . recovery is not barred.
>
> Yet in *Slayton* v *Michigan Host, Inc*, 144 Mich 535, 556 (1985), the Court recognized the "continuing wrong" theory of *Defnet* yet noted that
>
> > "However, while complete recovery may not be barred under the continuing wrong theory the damages recoverable are limited to only those occurring within the period of limitations, and where appropriate after the filing of the complaint.[10]

---

[10] But see *Sumner* v *Goodyear Tire Rubber & Co*, 427 Mich 505 (1986) in which the Court in the context of a discrimination action under the Elliott-Larsen Civil Rights Act, appeared to apply the continuing wrong theory to allow

> recovery for damages falling both within and without the period of limitations. Yet in the case at bar recovery is not premised on a violation of Elliott-Larsen. The traditional rule stated in *Defnet* and *Slayton* therefore applies.

Plaintiffs cite no case which casts a shadow on the accuracy of the foregoing analysis. The case that is cited by plaintiffs, *Rasheed* v *Chrysler Motors Corp.* 196 Mich App 196 (1992), *rev'd.* 445 Mich 112 (1994), is of no precedential force since it was reversed by the Supreme Court. In any event the Court of Appeals' Opinion reveals that the case involved a claim under the Elliott-Larsen Civil Rights Act. Hence to the extent that it adopts a continuing violation theory, as advocated by plaintiffs, it is not inconsistent with the foregoing principles set forth in Judge Simmons' Opinion. In any event, as noted by defendants, the Court of Appeals in *Rasheed,* confines utilization of a continuing violations theory to the following situation

> This requires a showing that plaintiff became aware that he was being victimized only when the last act occurred. ... if any act that .should have made the plaintiff aware that he was injured and that should have provided sufficient impetus to assert his rights falls outside the period of limitation, the plaintiff is left without a remedy because of his failure to pursue and protect his rights when he first became aware of the injury.

Id. 196 Mich App 208.

In the case at bar plaintiffs make no showing that the alleged wrongs perpetrated on them were only discovered within the period of limitations applicable to this case. Indeed the Court notes that that most, if not all the allegations involved in the at issue paragraphs

have been the subject of other lawsuits either directly or at least collaterally. Thus there could be no reasonable basis for plaintiffs asserting an unawareness that their rights had been violated as alleged in the amended complaint. Under *Rasheed*, plaintiffs are not entitled to use the continuing violations theory. Thus even if this Court looks to the Court of Appeals Opinion in *Rasheed* as persuasive authority on the issue, plaintiffs' position is still without merit.

For all the foregoing reasons the Court will grant defendants' motion with respect to paragraphs 26-119 of the amended complaint.

Defendants also argue that claims based on the allegations contained in paragraphs 120 through 124 of the amended complaint should be barred by the statute of limitations. Defendants, however, fail to appreciate that the statute is stopped from running when the complaint is filed. *Busciano v Rhodes*, 385 Mich 474, 483 (1971). Also in general an amended complaint relates back to the date of the original pleading. MCR 2.118(D). Thus the fact that the City or other defendants were served outside the period of limitations is not necessarily dispositive.

A cursory examination of the allegations of the paragraphs 120 through 124 shows that claims based on them would have accrued within three years of when the complaint in the case at bar was filed. Therefore, at least under the present arguments, it cannot be concluded that they are time barred.

Additionally, this Court notes that any claim based on the allegations contained in paragraph 134 are facially barred by the statute of limitations. In that paragraph it is alleged that plaintiff L. Qualls has refused to work in the business since June 27, 1986 when she was allegedly terrorized during a raid. This incident occurred well over three years before the complaint in this case was filed. Hence the statute of limitations operates as a bar from imposing liability based on those allegations.

Next the Court reviews defendants' contentions that paragraphs 120 through 124 of the amended complaint involve allegations that were issued in a case filed by plaintiffs against defendants in 1992, see *Qualls, et al* v *City of Detroit, et al*, Case

No. 92-206777-NI, and that therefore they are subject to dismissal under MCR 2.116(C)(6). That court rule allows summary disposition where "another action has been initiated between the parties." To invoke this court rule a defendant must show that the former action was still pending at the time the subsequent case was filed. *Darin* v *Haren*, 175 Mich App 144 (1988).

In the instant case a comparison of the claims at issue in the 1992 action with those at issue under the allegations contained in paragraphs 120 through 124 of the amended complaint in the case at bar show that they are substantially the same, and indeed plaintiffs do not call attention to any differences between them. The 1992 case was still pending when the instant case was filed. Hence defendants are entitled to summary disposition under MCR 2.116(C)(6) to the above noted paragraphs.

Defendants also argue that the allegations contained in paragraph 131 were at issue in the 1985 case. Yet, this paragraph, while referring to events in 1985 actually focuses on the 1994 dismissal of certain tickets issued in 1985. The Court is presently satisfied that paragraph 131 does not involve allegations identical to those involved in the 1985 action.

Given the foregoing, what remains of the factual basis for the theories of liability pled in paragraphs 138-143, are those facts that are alleged in paragraphs 125-133, 135-137.[2]

In examining the remaining viable allegations the Court notes that of the individual defendants, only defendants Bloom, Slaton, and Watson are expressly named. Because there appears to be no other basis in the amended complaint for holding the other

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[2]This Court need not resolve the evidentiary issue of the extent to which past acts -- as alleged in paragraphs 26-124 of the amended complaint can be used to show a policy custom or practice of the City. What the Court has decided is that no liability or damages can result solely on the basis of these allegations.

individual defendants liable,[3] the Court will grant summary disposition as to them. See MCR 2.116(I)(1), (2).[4]

Turning attention to the substance of paragraphs 125 through 131, these relate to various tickets issued to plaintiffs during the July 4th weekend of 1992. Three tickets, issued on July 1, 3, 1992, by Bloom to E. Qualls were based on an alleged "unapproved storage of fireworks" and an alleged "failure to discontinue the storage, possession, and offering for retail sale, illegal fireworks." Paragraphs 125-126. One other ticket was issued on July 4, 1994 to G. Qualls by Slaton and Watson for allegedly failing to limit storage of fireworks to 100 pounds or less outside the magazine on the premises. Paragraph 127.

These tickets were dismissed by the district court. Allegedly the district court ruled that a certain order of Judge Hausner issued, in a 1985 action involving the parties, was still in effect and that therefore the charges could not be maintained. Paragraph 128. It is alleged that these tickets were issued in bad faith or disregard for defendants' legal rights since the police officers testified that they were unaware of Judge Hausner's order, even though that order required the City to give a copy of it to any of the employees who came into contact with plaintiffs' business. Paragraph 129.

Next, on July 26, 1992 three tickets were issued to G. Qualls when a vehicle he was using to transport fireworks had stalled on the roadway. Allegedly two of the tickets were withdrawn, and the third was dismissed. The dismissal was subsequently affirmed. Paragraph 130.

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[3]These defendant are Robinson, Baker, Lang, Sneed, Michalak, Curley, Vann, Doyle, Wilson, Martin and Stephenson.

[4]Notably defendants Doyle, Wilson, Martin and Stephenson were only referred to in the introductory portion of the amended complaint. They are not again referred to, and it is not apparent that there is any specific allegation that they engaged in any substantive wrongdoing.

Finally, Paragraph 131 relates to tickets issued in 1985 and their dismissal in 1994 in district court.

Paragraphs 132 through 135 involve the plaintiffs E. Qualls and L. Qualls. In paragraph 132 it is alleged that E. Qualls worked for her father (G. Qualls} at the business establishment for every year relevant to the amended complaint. Further it is alleged that she personally observed the attacks on her father, his business, and the manner in which the City considered the 1989 trial. It is averred that these experiences caused her to become physically and emotionally distressed. Paragraph 133.

L. Qualls is also alleged to have experienced, observed and reacted to the attacks on her husband, their business and family. Paragraph 135.

In count one, paragraphs 138-139, it is generally alleged that, based on the foregoing allegations, defendants are liable under theories of false arrest, false imprisonment, malicious prosecution, abuse of process, intentional infliction of mental and emotional distress and intentional interference with advantageous economic relationships.

In count two, paragraphs 140-141, it is generally alleged that based on her foregoing allegations defendants are liable for violating plaintiffs' rights under the Michigan Constitution to be free from deprivation of property without process of law, unreasonable search and seizure and right to freedom of expression and to petition for redress of grievances.

Finally in count three, paragraphs 142-143, it is generally alleged that based On the foregoing actions defendants are liable based on a claim that plaintiffs' rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution (more specifically right to freedom of speech and redress of grievance, unreasonable search and seizure, malicious prosecution, and deprivation of property without due process of law) were violated.

In defendants' motion any liability premised on paragraphs 125-130 is attacked on the basis of MCR 2.116(C)(8), {10). Among the defendants' arguments is tidal the City is immune from liability for all tort liability. The Court agrees. See *Smith* v *Dep't of Public*

Health, 428 Mich 540, 544 (1987). Thus the City is entitled to summary disposition from any liability based on count one.

With respect to counts two and three these are premised on parallel provisions of the state and federal constitutions, nevertheless, plaintiffs do not cite to any law that would reflect that the at issue provisions should be construed differently. Thus the Court treats them the same. Preliminarily it is somewhat difficult to determine what constitutional violations are premised on the allegations contained in the still at issue paragraphs.

Based on the nature of those allegations and the substance of plaintiffs' brief in opposition of defendant's motion, it would appear that plaintiff's constitutional claims are essentially twofold: 1) that the issuance of the tickets without probable cause constituted a seizure under the Fourth Amendment, and 2) a due process claim arising out of plaintiff's contention that defendants maliciously prosecuted plaintiffs.

With respect to the latter basis, this Court still rejects plaintiff's contention that malicious prosecution alone could amount to a constitutional tort. *Albright* v *Oliver*, 510 US ___; 114 S Ct 807; 127 LEd2d 114, 121 N.4 (1994). Rather as noted in *Coogan* v *City of Wixom*, 820 F2d 170, 175 (CA 6, 1987)

> 0nly when the misuse of a legal proceeding is so egregious as to subject the aggrieved individual to a deprivation of constitutional dimension does § 1983 provide a remedy for a claim of malicious prosecution.

Oftentimes satisfaction of the element of egregiousness will involve showing that the plaintiff was actually placed in custody. *Dunn* v *Tennessee*, 697 F2d 121, 125 {CA 6, 1982), *cert den*, 460 US 1086; 103 S Ct 1778; 76 LE2d 349 (1983).

In our case the facts in the amended complaint do not show the issuance of the tickets was so egregious as to rise to the level of a constitutional deprivation of property without due process of law. In particular the Court notes that the issuance of the at issue tickets was

not accompanied by the incarceration of the plaintiffs. Nor do the other circumstances alleged reflect that the issuance of the tickets was "egregious." Accordingly to the extent that plaintiffs' due process claims rests on the issuance of the tickets defendants are entitled to summary disposition under MCR 2.116(C)(8) because this claim, alleged, is legally untenable.

With respect to the liability of defendants that is premised on an unlawful seizure of plaintiffs[5] defendants do not directly confront the issue of whether the mere assurance of a ticket could give rise to a finding that the person who had been given a ticket was "seized" as that term is used in our constitutions. Yet what defendants do contend is that the officer who gave out the tickets had probable cause to do so.

Our constitutional guarantees against unreasonable seizure of persons require that before a person is "seized" by the police that they have probable cause to believe that xhe person has committed some offense. *People* v *Bloxson*, 205 Mich App 236, 241 (1994). In *Brinegar* v *United States*, 338 US 160, 175-176, 69 S Ct 1302; 93 LEd 1879 (1949) the Court stated the now standard definition of probable cause:

> Probable cause exist where "the facts and circumstances within their [the officers] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

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[5]The only two plaintiffs arguably involved are G. Qualls and G. Qualls. Therefore to the extent that any relief on behalf of L. Qualls was sought on the basis of an alleged constitutional violation (other than a loss of consortium claim) defendants are entitled to summary disposition.

It has been repeatedly emphasized, however, that this standard is a "practical, non-technical conception." *Illinois* v *Gates*, 462 US 213, 232; 103; S C: 2317; 76 Led2d 527 (1976). Of course the foregoing standard is an ultimately fact specific standard. In the case at bar while defendants have submitted the affidavits of the issuing officer, and their notes,[6] nevertheless discovery on the issue is not yet complete. Nor can the Court say with any certainty that further discovery would be fruitless. Accordingly pending the close of discovery, this Court will presently deny without prejudice that part of defendant's motion that is premised on a showing of the existence of probable cause to issue the tickets in question. See *Regaulos* v *Community Hospital*, 140 Mich App 455 (1985) (grant of summary judgment is premature if made before discovery on a disputed issue is complete).[7]

In this connection the Court notes that G. Qualls' deposition was taken subsequent to the filing of defendants' motion, and the other two plaintiffs were also being scheduled for deposition. Additionally the transcript of the proceedings of the district court that are implicated in the amended complaint are being ordered. Finally the Court observes that the plaintiffs evidently have not as yet sought to depose the still at issue individual defendants or their superiors. This would appear necessary since an inquiry into probable cause necessarily involves an examination of what the officer was aware.

This finding also makes it premature to consider the individual defendants' immunity argument as well. Their argument pertains to the constitutional claims. Their contention is based on the

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[6]This part of this motion is thus properly considered as one brought under MCR 2.116(C)(10) because it depends on matters outside the complaint. See MCR 2.116(G)(5).

[7]Defendants correctly note that this Court has previously reached the issue of the existence of probable cause on a defense motion for summary disposition in the 1982 Case, yet there discovery had been completed.

assumption that the facts concerning their actions cannot be disputed. Nevertheless, until at least some discovery that is focused on the events that led up to the issuance of the tickets is conducted, this assumption is not warranted. Additionally the Court notes that no immunity argument is made on behalf of the individual defendants with respect to the state law claims.

The Court also rejects defendants' argument that the gist of any liability premised on those paragraphs concerning the issuance of tickets merely rests on asserting a violation of prior court orders. More is involved since the alleged violation led to alleged seizures of persons end property. Thus while this Court has previously held violations of a prior court order could not give rise to a due process violation because the orders of the court at issue gave rise to no vested property rights, nonetheless, the continued effectiveness of the order could affect the lawfulness of the activities of the officers in question. This aspect of plaintiffs' case is not fully developed by either party in their briefs, and thus this Court will not presently resolve it.

Finally, as noted by the defendants, plaintiffs have not alleged in their amended complaint that the acts of the officers were carried out pursuant to a policy, plan or custom of the City. This of course is necessary for establishing liability against the City under either the state or federal constitution. See *Smith* v *Dep't of Public Health*, 428 Mich 540, 642 ; (1987); *Monell* v *New York City Dep't of Social Services*, 436 US 658; 98 S Ct 2018; 56 LEd2d 611 (1978). Therefore the City is also entitled to summary disposition under MCR 2.116(C)(8) as to any claims based in counts two and three.[8]

In summary of the foregoing, the Court will grant in part and deny in part defendants' motion for summary disposition. Specifically the motion will be denied in part as to defendants

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[8]Defendants did not specifically address the remaining basis of liability that applies to plaintiff L. Qualls. See paragraphs 135-136 of the amended complaint. The Court does not otherwise address this aspect of the case.

Bloom, Slaton and Watson to the extent that the common law tort claims, as pled in count one, or the claims based on an unconstitutional seizure, as pled in counts two and three, are based on the allegations contained in paragraphs 125-133, 135-137 of the amended complaint[9] apply to them. Defendants' motion will be otherwise granted.

/s/ Michael L. Stacey
Circuit Judge

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[9]Notably during the relevant time period plaintiffs do not specifically allege in the amended complaint that any property was seized. Thus what is currently at issue is the seizure of the of plaintiffs G. Qualls and E. Qualls during the issuance of the tickets, as well as the allegations concerning L. Qualls in paragraph 135.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Glen Qualls, et al,

Plaintiffs,

vs.

City of Detroit, et al,

C.A. 85-515-546 CZ
HON. JOHN H. HAUSNER

Defendants.

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OPINION, PERMANENT INJUNCTION and ORDER

REGARDING CONTEMPT, DAMAGES

and
DECLARATORY JUDGMENT

DEC. 16,1988

At a session of sald Court held cn the
22nd day of November, 1988, in the Lafayette Building,
in the City of Detroit, with the Hcnorable John H. Hausner
Presiding:

Plaintiffs' COMPLAINT, Defendants' , CROSS-COMPLAINTS FOR CONTEMPT, Parties PROPOSED FINDINGS and OTHER PAPERS HAVING BEEN FILED: evidentiar'/hearings having been held hereon; expert testimony having been taken: documentary and phvsical evidence having been admitted: inspections and having been conducted; bench trial having been held hereon; arguments having been held thereon and the Court being otherwise fully advised in the premises:

The Court makes the following findings of fact and law:

By agreement of the parties, the contempt damages herein relate solely to direct business losses incurred-.from July 3 until July 8, 1985 and from June 23 until July 8, 1986. No consequential business or personal losses cr other categories of damages or time periods are involved in these proceedings, except the related attorney's fees and costs. All such damages are reserved for the pending jury trial.

Regarding the proofs, Plaintiffs presented only one witness,Glen Qual!s, the individua! Plaintiff and the sole owner and proprietor of the business enterprises involved and presented more than 250 exhibits in support of his claim

for damages.

Plaintiffs' economic damage proofs from the two contempt periods were calculated as follows: The gross sales and receipts for July 3 through July 8, 1985 and June 23 through July 8, 1986 were compared to gross sales and receipts for the comparabie period in 1984. The year1984 was considered to be the benchmark inasmuch as the 1984 firewcrks season passed without any significant interruption of P!ainrlffs' business due to litigation, ticketing,' arrest or other interference and was the year immediately prior to the events in disputee. The Court finds that such a methcd of comparison and calculation is reasonabie and is relied upon by the Court to determine the minimum damages which Plaintiff suffered by virtue of Defendants' contempt.

Regarding the issue of business growth and development, Plain[iff presented information from 1981 through 1987 as to the cost of goods sold in each year. Plaintiff testified, and there was no contradictory testimony or evidence, that the average markup in retail Class C common fireworks is about five times cost. Consequently, the growth in business and gross sales may be calculated as a multiple of the cost of goods sold for each calendar year, with adjustments for unsold stock.

Utilizing the above methods of proofs, Plaintiff demonstrated that the loss in gross sales for the period of July 3 through July 8, 1985, as compared to a similar period tn 1984 was $35,369.43, assuming no growth.

Plaintiff further proved from the cash register receipts that the difference in gross sales from June 23, 1984 through Jul.v 8, 1984 and the corresponding period in 1986 was $67,444.04, again assuming no growth. Therefore, the Court finds that the actual total loss in gross sales attributable to the contemptuous activity of Defendants is the sum of the two numbers above, $102,813.47. The Court finds that this is the minimum damage suffered by Plaintiff as a result of Defendant's contempt.

Using the "cost of goods sold" method of calculation described above, Plaintiff demonstrated that his gross sales increased by 27% berween 1981 and 1982, by 29% between 1982 and 1983, and by 26% between 1983 and 1984. Plaintiff then rounded the average of those figures downward and contended that, ar a minimum, his business was shown to have increased by ar least 25% in gross sales each year over the four year period just prior to the contempt periods in 1985 and 1986. Consequently, the rate of growth figure of 25 percent per year should be applied to his projected growth for the contempt years.

Using that method of calculation, Plaintiff demonstrated that his gross sales loss due to the contempt for the years 1985 and 1986 was S169,333.08.

Plaintiff also suffered property damage to a vehicle, locks, doors and merchandise in the amount of $ 3577.08. The Court finds that the method of calculation is a proper and reasonable one, that the accuracy of the figures has not been disproved. Therefore, $ 172.910.06 is the amount of damage to Plaintiff's' business and property caused by Defendants' contemptuous activities.

The Court further finds that Plaintiffs are entitled to statutory judgement interest on the damage award from the date that the damage was incurred. Therefore, the damage as of July 8, 1985 was $46,914.97, plus 12% per annum. The damages as of July 8, 1986 for the period of June 23 through July 8, 1986, was $125,995.19, plus 12% per annum.

The Court further finds that Plaintiff is entitled to reimbursement for all costs incurred in and for these particular contempt damage hearings and may present a bill for allowable costs at the time of the filing of the attorney fee petition herein.

The Court notes that the issue of Plainriff's status as a

corporation and/or as an assumed name proprietorship was raised at the initiation of the proceedings by Defendant for the first time. The Court finds that these proceedings have been undertaken to vindicate the authority of the Court and the Court has it within its inherent power to award appropriate damages and penalties for contemptuous activities by a party before it. Glen Quails as an indlvlduai Plaintiff and as the proprietor of the business and successor to all his business entities is entitled to receive such an award regardiess of tne status of tne corporation and proprietorship.

Certain claims were made by Defendant CITY OF DETROIT durlnq the course of these proceedings which allege fraudulent acts by Plaintiff. The Court finds that the Defendants chose to present no witnesses in this case and failed to produce any evidence of such allegations.

As to the issues before the Court on declaratory judgment, the Court finds and orders that the Plaintiffs are entitled to relief as follows:

As to clarification of the Court's ruling on items restricted by state law the Court finds that the specific items ruled legal for sale and use in Michigan on June 23, 1986.

The need for specificatien of the Court's restrictions on mass seizures from Plaintiffs is predicated on the Court's prior rulings on June 23-26, 1986. Only these items actually involved in the allegedly wrongful transaction and needed as evidence may be seized. Fireworks stock in excess of limits may only be ordered removed by Plaintiff.

The Court finds that the phrase "of like construction" is nowhere defined under any laws or regulations of the State of Michigan. However, the Court notes the State's adoption, both statutorily and administratively, of U.S. DOT Title 49 CFR transportation regulations, which clearly define the types of construction and size limits for Class "C" common fireworks

therein.

The Court finds that items which are not specifically included are deemed to be excluded from the prohibition of the state law. The Court further finds that, by virtue of Michigan's adoption of U.S. DOT regulations regarding the transportation of Class C common fireworks, it is implied that the state has adopted the U.S. DOT definitions of firecrackers, sky rockets (with stick), bottle rockets and roman candles as stated above.

The Court finds that the only fireworks which are restricted and require permission for use in Michigan are those specifically enumerated in MCLA 705.243a(2)(c), essentially, firecrackers, torpedoes, roman candles, whistling chasers, skyrockets, and in addition to those enumerated, missiles which are of like construction to skyrockets, differing
only by the use of fins instead of sticks for stability, and that all other fireworks are unrestricted and may be used in Michigan without permits.

The Court finds that the State Fire Marshal and local officials are precluded from classifying these undesignated items as being illegal or restricted for use in Michigan without permits.

Consequently, the Court finds that the following well defined categories of fireworks are not included in the Michigan statute's proscription either by specific designation or by considering them to be "items of like construction" to those so designated:

1. Helicopter-type rockets (49 CFR 173.100(r)(3),
2. Mines and shells (49 CFR 173.100(r)(9),
3. Ground spinners (49 CFR 173.100(r)(11),
4. Wheels (49 CFR 173.100(r)(6),
5. Illuminating torches (49 CFR 173.100(r)(7) and
6. New or novel items (49 CFR 173.100(r)(11).

The Court finds that there is no conflict or difference between the Michigan and federal definitions for Class B fireworks in that the definition in MCLA 750.243a is a verbatim adoption of the U.S. D.O.T.'s classifications and definitions for the same.

The Court finds that, in addition to the abridged definition of class C fireworks as listed in MCLA 750.243a(i)(c), the statute adopts the full U.S. DOT definitions for class C common fireworxs by reference at MCLA 750.243c(a). The Court notes that none of the items permited in Michigan b specific reference in MCLA 750.243a(3)(d), being flitter sparklers, cone fountains and cylinder fountains, are specifically referred to in the statute's abridged definitions even though they are the largest of all the items specifically allowed. The Court also notes that the class of the fireworks, whether B or C, is not related to sales in the application of the statute but only to the transportation or storage of fireworks.

The Court finds that only transportation and storage are affected by the classl-lcation of fireworks and that when class C is referred to as it relates to transportation or storage it shall include all items defined as class C common fireworks by U.S. DOT Title 49 CFR.

As it relates to storage, the Court finds that the reference in the distance table in MCLA 750.243d (b), the same being adopted from NFPA 1124 [formerly 44A)-a recognized national standard, "Class C fireworks" shall be deemed to mean U.S. DOT Class C common fireworks.

The Court finds that Plaintiffs' planned site for a storage building is more than 70 feet from the nearest inhabited building and more than 35 feet from the nearest public highway by its own measurement and therefore, when completed in compliance with the other statutory requirements of MCLA 750.243d, the Plaintiff shall be

entitled to use it for the storage of U.S. DOT class C common fireworks, limited to 400 pounds net weigh (1600 pounds gross product weight) per the statutory table of distances.

IT IS HEREBY ORDERED that the following specific items, having been demonstrated for the Court, are adjudged legal for sale and use in Michigan without permits:

1. California Rockets.
2. Golden Flowers.
3. Brilliant Sunrise.
4. Four Seasons.
5. Plum Flowers Report Spring.
6. Peach Flowers in Spring.
7. Silvery Flowers.
8. Sparkling Fountain.
9. Happy Fireworks.
10. Dessert at Night.
11. Colour Pearl Flowers.
12. News Transmitter.
13. California Candle.
14. Tigerhead assorted fountains, and
15. Moon Shot cone fountain.

IT IS FURTHER ORDERED that the CITY OF DETROIT or any of its officials shall not take any action to limit or restrict ingress or egress to the Plaintiffs' premises by vehicles or pedestrians. They may manage traffic there for the purpose of maximizing ingress and egress of pedestrian and vehicular traffic. The number of uniformed officers shall be limited to those necessary to facilitate the flow of traffic and they shall not assume any posture or take any action likely to inhibit patronage of Plaintiffs' enterprise but shall actively involve themselves in directing traffic in such a manner as to maximize ingress and egress of pedestrian and vehicular traffic.

IT IS FURTHER ORDERED that maintaining shelf stock on

hand for retail sale shall not be construed as storage for the purpose of the regulating the storage of fireworks pursuant to statutes or ordinances. The Defendant shall not interfere with the Plaintiffs' right to possess and stock any and all types of DOT Class C common fireworks. If the Plaintiff is found to have more shelf stock than 1000 pounds of fireworks in his existing building, the Fire Marshal may order the Plaintiff to promptly remove any overage from the building in question.

IT IS FURTHER ORDERED that the CITY OF DETROIT or any of its officials, employees, representatives or agents shall not seize any of the Plaintiffs' Class C common fireworks which are not included in a specific illegal transaction pursuant to any process or document, without a further specific order of this Court. If the CITY makes a covert (or overt) purchase that it alleges is illegal, the fireworks so purchased shall suffice as evidence to proceed with any prosecution therefrom.

IT IS FURTHER ORDERED, in accordance with the Court's findings of fact and law on the record on November 22, 1988, that the Plaintiff shall be and hereby is, awarded a Judgment for damages incurred as a result of Defendants' contempt from July 3rd through July 8th, 1988 in the amount of $46,914.97, along with statutory interest thereon from and after July 8, 1985.

IT IS FURTHER ORDERED that the Plaintiff shall be, and hereby is, awarded a judgment for damages incurred as a result of Defendants contempt from June 23rd through July 8th, 1986 in the amount of $125,995.19, along with statutory interest thereon from and after July 8, 1986.

IT IS FURTHER ORDERED that Defendant CITY OF DETROIT shall reimburse Plaintiff GLEN QUALLS for all

allowable costss incurred in and for these contempt damage hearings and may present a petition therefore along with the filing of the attorney fee petition herein.

Regarding attorney's fees, the Court has reviewed the attached statement of Dennis M. Hayes requesting an award of $3,034.25 for his services herein. The Court awards him the cost for the six-and-a-half hours of non-court time at $100 an hour and the fourteen and three quarter hours of court time at S150 an hour which would be a total of $2,862.50, with interest at 12% per annum from and after the (sic) 11/22/88.

IT IS FURTHER ORDERED that the fee for Hugh M. Davis, Jr., shall be calculated at the rate of S150.00 per hour for out of court work and $200 per hour for court appearances, based on the Court's previous findings regarding the rates applied to work done in 1985 and 1986, and the Plaintiffs' stipulation to those rates for the work done to date in 1988.

IT IS FURTHER ORDERED that Defendant CITY OF DETROIT shall pay all of Plaintiff's attorney's fees for these proceedings, with interest at 12% per annum from and after the 11/22/88. The petition by Plaintiff's Counsel for attorney's fees related to the contempt herein shall be separated from whatever time was expended preparing for the jury trial herein.

Inasmuch as Defendant CITY OF DETROIT is still obligated to pay all of Plaintiff's attorney's fees for proceedings relating to the contempt, inasmuch as the finding of contempt, itself and the previous award of attorney's fees is on appeal and inasmuch as substantial future time will be expended by counsel in these proceedings, Plaintiff is not required to submit his petition until two weeks
after the Courts' Opinion and Order on Contempt Damages has been entered.

IT IS FURTHER ORDERED that the Defendant CITY OF DETROIT, by and through its legal department, shall specifically provide a copy of this order to every individual defendant herein.

all other current personnel assigned to the llth Precinct and the Fire Marshal Division of the Detroit Fire Department, and every other CITY official.employee, representative or agent who shall have reason to come to or be in contact with the Plaintiffs' business or who shall be involved in any decision making process regarding said business and shall specifically inform the same individuals that any violation of this Injunction will subject said individual to imprisonment and/or fine.

Dated: December 16, 1988

/s/
Hon. John H. Hausner
CIRCUIT COURT JUDGE

Supreme Court, U.S.
FILED
MAR 25
CLERK

(3)

No. 99-1386

In The SUPREME COURT OF THE UNITED STATES

GLEN QUALLS, et al.,

Petitioners

v.

CITY OF DETROIT, et al.

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

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3 pp

Questions Presented

Respondents believe that the unpublished decisions below present no question warranting review by this Court, and that the petitioners waived their rights to present the second question they seek to present by failing to make that argument to the Michigan Court of Appeals below. However, respondents believe the issues petitioners seek to present are more accurately stated below as:

1. Whether the holder of a license that expired by its terms and by the City Fireworks Ordinance on February 28, 1985, had a property or other constitutional or federally protected right to that license, after he failed to file a timely a application for renewal and failed to ask for an application for a new license until March 16, 1985 ?

2. Whether an injunction, later vacated on appeal, confers a property or other constitutional or federally protected vested right on the party obtaining the injunction ?

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The Parties to the Proceedings

Petitioners accurately list the parties. Each respondent other than the City of Detroit was an officer or employee of the City of Detroit involved in the enforcement of the Detroit Fireworks Ordinance and the Michigan Fireworks Act. Donald Pailen was the Corporation Counsel, and Frank Jackson and Alberta Whitfield were Assistant Corporation Counsel. William Hart was the Chief of Police and James Bannon was the Deputy Chief of Police. Donald Robinson was the Fire Marshall of Detroit, Robert Michalik was his second in command. Esther Shapiro was the Director of the Detroit Department of Consumer Affairs. The remaining named individuals were police officers, firefighters or other City employees.

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. 1257(a). Petitioners seek review of the decision of the Michigan Court of Appeals dated May 26, 1998 (Q.App. D), rehearing denied, Sept. 4, 1998 (Q.App. C). Petitioners Delayed Application for Leave to Appeal was denied by the Michigan Supreme Court on Aug. 31, 1999 (Q.App. B). On or about Nov. 24, 1999, petitioners filed a motion for an extension of 60 days within which to filed a petition for a writ of certiorari, and that motion was docketed as No. 99-A457, and was granted by Order of Justice Stevens. The petition was timely filed pursuant to that Order on January 27, 2000, and was docketed on February 22, 2000.

PUBLISHED OPINIONS

There are no published opinions in these civil cases. The order of the Michigan Supreme Court dated Aug. 31, 1999, denying the Delayed Application

for Leave to Appeal from the unpublished Opinion of the Michigan Court of Appeals (Q. App. D) is reported at ____ Mich ____, 601 N.W.2d 391 (Mich August 31, 1999). The order of the Michigan Supreme Court denying leave to appeal from the unpublished Opinion and Order of the Court of Appeals dated March 6, 1991 (Q. App. K) is reported at 437 Mich. 1017, 472 N.W. 2d. 636 (1991).

The decision of the Michigan Supreme Court on a related criminal case between the parties is found at Detroit v. Qualls, 434 Mich. 340, 454 N.W. 2d 248 (1990), stay vacated 437 Mich. 1017, 472 N.W. 2d 636 (1991).

STATEMENT OF THE CASE

A. The Underlying Facts.

Glenn Qualls operated a seasonal retail fireworks store at 817 Seven Mile Road, Detroit, near the intersection of I-75 and Seven Mile Road, known as "Ho Lee Kow" beginning in 1978. From 1979 to 1984, Qualls obtained annual City licenses to operate his store. During a December 1984 hearing in a

related criminal proceeding by the City, Qualls testified that he kept over 100 pounds of fireworks at his store although storage was limited to 100 pounds on the face of his license, by the City Ordinance, and by orders and settlement agreements in earlier litigation between Qualls and the City. E.g. Q.App. m1. During the same month, a large fireworks storage facility owned by Qualls and located in Romulus, Michigan, exploded, demolishing the building and sending chunks of concrete hundreds of feet away. The morning after the explosion a City official placed a "do not renew" note in Qualls' license file, indicating that the license should not be automatically renewed. The time for renewing the license and the license itself expired on February 28, 1985, and Qualls did not file an application to renew it until at the earliest March 16, 1985, when he submitted a licensing fee for the next season. Q. App. D, d4. On April 16, 1985, Qualls sent a letter to Esther Shapiro, Director of the Office of Consumer Affairs asking that his license be renewed. By letter of April 22, 1985, Ms. Shapiro denied his request,

because, among other things, Qualls stored more than 100 pounds of fireworks in his store, contrary to the express terms of the Detroit Fireworks Ordinance and the license he held. Q. App. D, d 4. Qualls did not seek administrative review of that decision. Q. App. G, g 4.

Qualls opened the store in the Spring of 1985 without a license, and filed the present action challenging the City's Fireworks Ordinance. He obtained a preliminary injunction by order of the trial court (Judge Hausner) on July 3, 1985, and further injunctive relief on June 24, 1986. Q. App. N, n 1-3, and 4-9. The injunctive orders were stayed and reversed on appeal in June, 1989 and March, 1991. Q. App.K, k 18, and k 20, and were formally vacated in 1992 and 1993. Q. App. F, f 4. He did not operate retail fireworks store in Detroit thereafter.

B. Litigation between Qualls and the City of Detroit Since 1979.

Michigan, like a majority of other states, has long exercised the authority to restrict the sales of fireworks items that are not restricted by federal law. *See generally, Validity, Contruction and Application of State or Local Laws Regulating the Sale, Possession Use or Transport of Fireworks*, 48 ALR 5th 659 (1997).

1. In 1979, the City arrested an employee of Qualls, and seized some of his fireworks, and it seized additional fireworks in 1980. Qualls sued to obtain the return of the fireworks, and the suit was settled. See facts stated in *Qualls v. City of Detroit*, 434 Mich. 340, 454 N.W. 2d 248 (1990), *stay vacated* 437 Mich. 1017, 472 N.W. 2d 636 (1991) (hereafter "Qualls I").

In the summer of 1984, the City issued a ticket to Qualls, charging him with violating the 100 pound weight limit set forth in the Detroit Fireworks Ordinance. *Detroit v. Qualls*, 36th Dist. Court No. V87-516. That suit resulted in the decision

of the Michigan Supreme Court in *Qualls I*, above.

2. The first of the three cases filed in the Wayne County Circuit Court (hereafter either the "trial court' or "WCCC") on which petitioners seek review, WCCC CA 85-515-546, was filed in June, 1985. The trial court issued a preliminary injunction on July 3, 1985, and further injunctive relief on June 24, 1986. Q. App. N, n 1-3 and n 4-9. The trial court also held that the City was in contempt of its orders, and found that Qualls had lost $169,333 in gross sales for 1985 and 1986 as a result of the City's conduct, and that the City caused $3,577 worth of damages to Qualls' property; and therefore assessed contempt damages for a total of $172,910 in damages, and ordered the City to pay that amount, plus interest and attorneys' fees. The same order contained further injunctive rulings. Q. App. R r 1-11. The City appealed as of right.

On appeal the Court of Appeals, relying in substantial part upon the ruling of the Michigan Supreme Court in *Qualls I*, held that the Michigan Fireworks Act did not preempt more

restrictive regulation of fireworks by home rule cities. That Court also held that the City licensing ordinance was constitutionally valid, and that the licensing procedures of the City were valid, if they were not so vague and without discernible standards as to give undue discretion to city officials, and remanded for further proceedings. The unpublished Opinion of March 6, 1991, is found at Q. App. K. That Opinion is referred to in subsequent decisions of the trial court as "*Qualls* II."

In *Qualls II*, the Court of Appeals also reversed the injunctions and vacated them for further consideration in light of *Qualls I* and its decision. Q. App. K . The Court of Appeals, however, sustained the contempt holding, but ruled that the trial court had erred in assessing damages, among other things because the lost profits must be based upon net profit, not gross profit, as ruled by the trial court. Q. App. K, k 23-24. It also sustained some other rulings of the trial court, and remanded for further proceedings. Id. k 28-35.

On remand, the trial court (per Judge Hausner) entered an order vacating most[1] of his own orders. Order of March 5, 1992. Qualls in 1992 filed an additional action, alleging the same kinds of conduct as in the 1985 suits. CCWC C.A. No. 92-206766 NI. Shortly thereafter, Judge Hausner recused himself, and the case was assigned to Judge Simmons. After a trial on the merits of Phase I of the suit (issues concerning prospective relief) Judge Simmons entered an Opinion of April 28, 1993, Q. App. E, and Order of May 17, 1993, Q. App. F.

As Glen Qualls admitted in his testimony and in the Brief in the Court of Appeals, the preponderance of items sold at the Ho Lee Kow store were fireworks lawful for sale to consumers under federal law (DOT Class "C" or common fireworks), but restricted under the Michigan Fireworks Act to

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1. The only relevant order not vacated by Judge Hausner was issued in December 1988. See. QA 390a in the Court of Appeals. The City had not listed it among the orders to be vacated because it was primarily concerned with damages for contempt, an issue that became moot when the underlying orders were vacated. That order was vacated by Judge Simmons. QA f-4.

holders of display permits (MCL 750.243a(2)) and those selling for shipment to a state where consumers could lawfully possess such items (Court of Appeals Order of June 27, 1989 construing MCL 750.243a(3)(g) and Court of Appeals decision in "*Qualls* II"). *See also*, list of Qualls' admissions at Appeal Brief, DA tab 1, p. 1. They were unlawful for sale by Qualls under the Michigan Fireworks Act as well as under the City's Fireworks Ordinance. *Id.*

Although Judge Hausner ruled in 1985 and 1986 that some of those items were lawful for sale in Detroit by Qualls, that ruling was based on the erroneous view that Qualls could sell any item allowed by Federal law to consumers who signed a statement that they would take them (by bicycle, foot or car) out of state, and the ruling that the Detroit Ordinance was void and unenforceable. Orders of June 24, 1986, QA 172a; December 1988, QA 283a, 390a. The "loophole" for shipment out of state was closed by a Court of Appeals Order of June 27, 1989 and in *Qualls II.* Q. App. K, k 17-20. The injunctive

rulings were explicitly vacated on remand. Orders of March 5, 1992; May 17, 1993. Q. App. F.

By Opinion of April 28, 1993, the trial court (Simmons) ruled, *inter alia,* that the phrase "fireworks containing an explosive or flammable compound" as used in MCL 750.243a(2)(d) means all fireworks. Thus, it is unlawful to "offer for sale . . . possess, give, furnish, transport [or] use . . ." all fireworks without a permit, except for those categories explicitly listed in MCL 750.243(a)-(f). The Court of Appeals affirmed that ruling in May 1998, based upon the law of the case doctrine. Q. App. D, d 2. Later, the Michigan Court of Appeals found precisely the same meaning in precisely the same statutory language, *Stajos v City of Lansing*, 221 Mich App 223, 561 NW2d 116 (1997), *appeal denied*, 584 NW2d 588 (Mich Aug. 28, 1998), *reconsideration denied*, 587 N.W.2d 500 (Mich. Oct. 26, 1998), *cert. denied*, U.S. , 119 S.Ct. 1455 (1999).

The testimony of Glen Qualls was that he sold the

restricted items without a permit to customers with no permit, and kept more than 100 pounds of fireworks on the premises of Ho Lee Kow in Detroit, because he could not make a profit selling only fireworks that were unrestricted under the Michigan Fireworks Act as construed above. He testified that the only lawful fireworks items under the Act as so construed were small and inexpensive, and because he sold fireworks only during the Fourth of July holiday season, he could not make a profit on such sales alone. In light of his testimony that he could not lawfully operate under the Michigan Fireworks Act as so construed, his claim for damages for contempt of court became moot after *Qualls* II, because he suffered no harm from the operation of a lawful business, and could only make a profit through the storage and sale of fireworks that were unlawful for sale in Michigan except to permit holders.

In his Opinion of April 28, 1993, Judge Simmons ruled that the Ordinance was largely valid and constitutional, except for the provisions barring the sale of cone fountains and smoke

devices. Q. App. E.

Thereafter the trial court granted defendants' motion for summary disposition in part, and ruled among other things that there was no liability of the City for the denial of Qualls' late application for renewal of his license in 1985, both because his application was late, and because in fact he admitted in testimony that he had repeatedly stored more than one hundred pounds of fireworks in the store. Q App. G, g 4-9. The Court also rejected the claims of Qualls that the violation of Judge Hausner's orders violated a constitutional or other vested right of Qualls. Q App. G, g 14-15.

A fourth case was filed by Qualls, et al in 1994, alleging the same kinds of conduct by the City. CCWC C.A. 94-420312 CZ. The trial court (per Judge Stacey) granted summary judgment for the City on most of the claims. Q App Q.

Thereafter, in 1995, the remaining claims in the three cases were settled and/or dismissed, without prejudice to the right of the plaintiff Qualls et al to take an appeal from any

errors alleged in the prior decisions. Q App. H and J. Qualls appealed as of right to the Michigan Court of Appeals, and the City cross-appealed on one issue concerning the validity of the provisions of the Fireworks Ordinance that the trial court had found to be invalid. In 1993, the City adopted an amended Fire Ordinance that was consistent with the rulings of the trial court, and that clarified a number of provisions that had been ambiguous or antiquated. City of Detroit Ordinance 10-93, June 30, 1993.

The proceedings on appeal were delayed for many months. Defendants-Appellees and Cross-Appellant, City of Detroit, et al, filed a motion to dismiss the appeals for failure to comply with the timeliness rules and for failure to prosecute the appeal. The Court of Appeals initially granted the motion, but later granted the plaintiff Qualls and others leave to file a Brief served on November 13, 1996.

The nine issues listed by Qualls in the Brief for Appellants were 1) that the City and its employees had denied

Qualls a license in violation of his rights of due process; 2) that the Fireworks Ordinance is invalid on its face and as applied; 3) that the Michigan Fireworks Act is preempted by federal statutes and regulations; 4) that the Act is void for vagueness; 5) the federally defined categories of consumer categories are not "of like construction" to the restricted items in the Act; 6) that the trial court erred in ruling that the phrase 'all fireworks containing an explosive or inflammable compound' includes all fireworks; 7) the history of the Michigan Act is one of inclusion, not total prohibition; 8) the trial court erred in finding as a matter of law the acts of the defendants "merely contemptuous, not a violation of civil rights"; and 9) that the Court of Appeals should reconsider its ruling in *Qualls II* on the sales for shipment out of state issue.

In rejecting the "civil rights" claims of Qualls under 42 U.S.C. 1983, the trial court had relied upon the decisions of this Court in *Albright v. Oliver,* 510 U.S. 266 (1994), *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) and

Smith v. Dept. of Public Health, 428 Mich 540, 642 (1987). Q. App. Q q 9-12. In its argument on pages 95-99, the Brief for Qualls did not cite or discuss any of those cases. Nor did the Court of Appeals on appeal. Q. App. D, d 6.

We have reviewed pages 95-99 of the Brief for Qualls in the Court of Appeals (the only section addressing the alleged civil rights issues), and have found no discussion of the second "Question Presented" in the Petition (p. a) and no argument that the trial court erred in its reliance (Q. App. G, g 24) upon *United States v. United Mine Workers*, 330 U.S. 252, 295 (1947).

By unpublished Opinion of May 26, 1998, the Michigan Court of Appeals affirmed the rulings of the trial court on all counts. The Court expressly rejected the claims based upon the failure to renew Qualls' fireworks license in 1985. Q. App. D. There was no discussion by the Court of Appeals of any theory that the 1985 and 1986 orders of Judge Hausner somehow conferred property rights upon Qualls, nor

did the Court of Appeals in that unpublished Opinion cite or rely upon the *United Mineworkers* decision, *supra*. In short, Qualls failed to assert any argument in the Court of Appeals that the trial court had erred in applying the *United Mineworkers* ruling to the facts of this case, or that the decision in that case was outdated, distinguishable or otherwise not the law of the United States.

REASONS FOR DENYING THE WRIT

The unpublished decisions of the Court of Appeals of Michigan set forth no novel or important ruling of law. Indeed, by deciding not to publish its two opinions in this case, the Court of Appeals determined that they had no precedential value. M.C.R. 7.215(B) & (C).

Those two intermediate state court opinions are not in conflict with any decision of a United States Court of Appeals, nor are they in conflict with the decision of any state court of last resort of any other state. The Petition indeed asserts no such conflict. Accordingly, the Petition fails to assert any

consideration in favor of the grant under Rule 10(a) or 10(b) of the Rules of this Court warranting the grant of the Petition. And the Petition asserts no conflict between the appellate decisions below on an important issue of federal law with the relevant decision of this Court under Rule 10(c). Nor does the Petition identify any issue of federal law that should be, but has not been settled by a decision of this Court. See, Rule 10(c). Accordingly, the Petition should be denied.

A. Qualls Lost Any Property Interest He May Have Had in His One Year Fireworks License When He Violated the City Code, Then Failed to Apply for Renewal Before the Expiration Date

The primary argument made by Qualls in the Petition is that the courts below erred in failing to recognize that the City's denial of a license to Glen Qualls in 1985 deprived him of a constitutional right, because of the automatic renewal provision of the Detroit Licensing Ordinance and the failure to give notice of its intent to deny. Petition at 1-6. However, the Licensing Ordinance provides that "Unless the interested City

departments notify the consumer affairs department of an existing violation at least fifteen days before the expiration of the licenses, the licenses will be renewed." Sec. 30-1-14, entitled "Renewal." The Ordinance specifies that violation of a City Ordinance is a ground for denial, suspension or revocation of a license. Sec. 30-1-16(b)(1)(a). Q. App. P, p 5. In this case, the uncontradicted evidence showed that the Consumer Affairs Department had received notice of an existing violation in December, 1984, by virtue of Mr. Qualls' testimony that he stored between 300 and 400 pounds of fireworks at the Ho Lee Kow store in Detroit. Although the license stated on its face that it expired in February 1985, Qualls apparently made no inquiry about his license or the receipt of a renewal application or notice before March 15, 1985, when he appeared at the department of Consumer Affairs to ask for a license form, after the license had expired by its own terms. Qualls made no written application for renewal until his letter of April 16, 1985. Q. App. G g 4-9. Under the settled law of

Michigan, as with most other states, a license holder who has not filed an application until after his license has expired is not seeking renewal, but the grant of a new license. Id., and cases cited. The decisions on this point are in accord with the settled authority of the courts of Michigan and the courts of other states and with the decisions of federal courts. Id. There is no reason for this Court to review those decisions.

B. Petitioner Failed to Preserve his Argument that Alleged Violations of Injunctive Orders Later Reversed On Appeal Rise to the Level of Violations of the Laws or Constitution of the United States Actionable Under 42 U.S.C. 1983; Further, the Argument is Contrary to Settled Law and is Largely Moot

The Petition relies upon the dissent *in United States v. United Mine Workers, supra*, and argues that the trial court misapplied that case to the facts before it. However, the Petition neglects to mention that Qualls and the other plaintiffs waived any right they had to make that argument in this Court, because they failed to make it in the Court of Appeals below. See Rule 15.2. Indeed, the trial court cited that case after the

sentence stating that "This injunction gave the plaintiffs no property rights, not only for the reasons stated earlier, but for the reason that it was ultimately vacated as having been erroneously issued." Q. App. G, g 24. Even the trial court did not rely upon that decision as the primary basis for its holding that Qualls had no property interests.

In any event the argument is without merit. As the trial court ruled, no suit lies against the City for deprivation of a federal right under 42 U.S.C.1983, unless the plaintiffs have alleged and can show "that acts of its officers [violating their rights] were carried out pursuant to a policy, plan or custom of the City." The trial court ruled that Qualls had failed to allege or introduce evidence showing that there was any such policy or practice or custom of the City. Q. App. Q, q 12.

Finally, that question of law is largely academic in light of the rulings upholding the weight limit and licensing scheme of City Ordinance and the City's interpretation of the Michigan Fireworks Act as barring the possession or sale of most of the

items Qualls sold. Qualls admitted that he kept 300-400 pounds of fireworks and that he the bulk of his sales of fireworks were of fireworks that were restricted under State law as interpreted by the trial court and the Court of Appeals. He has consistently argued that the laws are invalid precisely because they prevent him from lawfully conducting a profitable business as a seasonal fireworks dealer in Detroit. Accordingly, any financial interest he may have had in conducting the kind of business he conducted under the trial court's orders of 1985 and 1986 (and therefore any loss he suffered by the City enforcement efforts which he believes to have been unconstitutional) was based upon unlawful conduct by him and his employees. There is no federal constitutional or statutory right to engage in a business which is prohibited by valid state and local regulation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 23, 2000